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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

No. 15911.

BILL WILLIAM PROHOROFF,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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JURISDICTION.

This is an appeal from a judgment rendered and entered by the United States District Court for the Southern District of California, Northern Division. The appellant was sentenced to custody of the Attorney General for a period of six months. (R. 5-6)* Title 18, Section 3231, United States Code, confers jurisdiction in the district court over the prosecution of this case. This Court has juris-

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*R refers to the printed Transcript of Record.

diction of this appeal under Rule 27 (a) (1) and (2) of the Federal Rules of Criminal Procedure. The notice of appeal was filed in the time and manner required by law. (R 8)

STATEMENT OF THE CASE.

The indictment charged appellant with violation of the Universal Military Training and Service Act. (R 3-4) It was alleged that he became a registrant of Local Board No. 71 of the Selective Service System in the County of Fresno, State of California, and that having theretofore been duly classified in Class I-A, did knowingly refuse and fail to comply with the order of his said Local Board No. 71 to report for induction. (R 3-4)

Appellant pleaded not guilty, waived jury trial and was tried on December 30, 1957. (R 9) A written motion for judgment of acquittal was filed. (R 4-5) The motion was denied and the appellant was found guilty and sentenced on January 20, 1958. (R 39) The motion contains all of the grounds that the Appellant relies upon for reversal of the judgment in this case. (R 50)

THE FACTS.

Appellant was registered with the Selective Service System on December 30, 1952 (Ex 1, 2); this registration and all subsequent acts were the result of repeated effort by the F.B.I. (Ex 115, R 43)*

Ex refers to the Government's exhibit, the selective service file of appellant. The pagination is at the bottom of each sheet of the exhibit, circled.

He was sent the standard Classification Questionnaire (SSS Form No. 100) on February 2, 1953. He returned this 8 page form with only his signature inserted (Ex 7-14) accompanying it with a letter stating "When I talked to your detectives in Fresno I explained our whole religion to them." (Ex 16) At the time of his sentencing he informed the Court that he considered it wrong to perform any part of the conscription process but that, at the urging and on the advice of the F.B.I. agent he cooperated as a law-abiding citizen. (R 43)

So, with the F.B.I. agent bringing him in again and again for questioning and explaining, at every step, he not only registered but signed and returned the Classification Questionnaire and eventually the Special Form for Conscientious Objectors (SSS Form No. 150). (R 46, Exs 64-67)

In this Special Form he claimed that he should be exempted from *military* service of any kind because he had opposition to participation in warfare on religious grounds. (Ex 64) He showed that he believed in a Supreme Being; that he had had religious training (Ex 64); that he was raised in the Molokan faith and believed in it (Ex 65, No. 3); that he was a complete pacifist (Ex 65, No. 5) and that he had given public expression of his beliefs (Ex 65, No. 7). He showed that both his parents were Molokans (Ex 66, No. 5) and that his church was one of the so-called historic peace churches (Ex 66, No. 2 (e)); that he never had been connected with any military organization (Ex 66, No. 3) and he gave three references pertaining to his sincerity. (Ex 67)

Thereupon the Local Board without any evidence contradicting any of his showings reclassified him in the same Class I-A (available for any type of military service). (Ex 15)

Thereafter he was ordered to report for induction, and, upon his failure to do so was indicted.

QUESTIONS PRESENTED AND HOW RAISED.

I

The threshold question of availability of defenses is present because appellant never took an administrative appeal.

The question here presented is whether the rule of exhaustion of administrative remedies should be relaxed due to the presence of mitigating facts. This question was raised when the trial judge stated that he had "no power" to review the propriety of the action of the local board because of the defendant's failure to appeal during the administrative process. (R 36)

II

Appellant presented written evidence to the local board which, if true, showed that he met all the statutory requirements for a conscientious objector classification. Without any recorded adverse evidence the board rejected his *prima facie* case.

The question here presented is whether his file shows anything that constituted a basis in fact for rejecting his evidence. This question was raised by the motion (R 4)

and by the trial court's refusal to consider this ground. (R 36)

III

Appellant presented evidence that there were four selective service local boards officed together in Fresno. (R 12, 23) Appellee offered evidence to show that Local Board No. 71 had geographical jurisdiction over the area where appellant resided on the date of his registration.

The question presented here is whether appellee's evidence was admissible over objection (R 25, 26, 32, 33), and did it afford a basis for the trial court to take judicial knowledge that this local board had geographical jurisdiction.

SPECIFICATION OF ERRORS.

I

The district court erred in failing to grant the motion for judgment of acquittal.

II

The district court erred in convicting the appellant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT.

I

The court-made rule requiring that a defendant exhaust his administrative remedies should be relaxed when a proper showing is made to excuse such failure and when

the defendant has a meritorious defense that would gain him acquittal, if available.

The facts in this case bring appellant within the position taken by this Court in *Evans* v. *United States,* 252 F. 2d 509.

II

Appellant submitted facts *prima facie* entitling him to a conscientious objector classification. There was not a scintilla of evidence placed in the file contradicting his certificated evidence.

The only possible basis the board could have, outside of the "speculation and suspicion" condemned by the Supreme Court in *Dickinson* v. *United States,* 74 S. Ct. 152, 158, is the board's repeated experience with him as a delinquent. Annoying as this experience may have been to the board, it gave no basis for a belief that he was a sham or insincere; in fact, everything connected with his recalcitrance is consistent with sincerity and truthfulness; it even compels a belief in it. Finally, there never was a finding of insincerity. The only adverse recordation was that he was an "evader", a term consistent with religious sincerity, and this appellation was applied to him only long after he had failed to report for induction. (Ex 117)

III

Appellee attempted to show that Local Board No. 71 had geographical jurisdiction over appellant, in the following ways:

1. By stipulation. Appellant refused. (R 14)

2. By witness Hathaway. This attempt foundered when it became evident he had made the map from a description of boundaries dated after the date of appellant's registration. (R 20-21)

3. By witness Ford. The Court accepted her testimony as a basis for using the doctrine of judicial notice. Appellant had objected to her testimony on the grounds of no foundation, hearsay and not relevant. (R 25, 26, 32 33)

ARGUMENT.

I.

Appellant Should Not Be Barred from His Defenses Because He Did Not Exhaust His Administrative Remedies.

The undisputed evidence concerning appellant's conduct during his selective service processing is susceptible of two opposite views:

1. He was a slacker who deserves no sympathy or leniency from a court;

2. He was a sincere religious objector whose consistent conduct of opposition to military service entitles him to his day in court, to have his defenses weighed.

Appellant urges that the Court adopt the second view. The relevant facts are to be found in the selective service file (the Exhibit) and in appellant's statement to the trial court. (R 43) Read together the appellant's motivation is obviously not a desire to obstruct the administrative process or to mislead the draft board or the F.B.I.; he definitely believed the Molokans were exempt from registering for

military service. (R 43) However, when the F.B.I. agent informed him that this wasn't so (R 44, top) he replied "Well, if that's the case, Mr. Groves then I feel I'm not taking part in any kind of military service if I register," and the agent said "That's right." (R 44, bottom)

This above-stated explanation is consistent with all his conduct, prior and subsequent. Any other explanation is unnecessarily skeptical and tortured.

The record further shows that he relied on Mr. Groves (R 47) and that the agent never mentioned anything to him about taking an administrative appeal if the Local Board did not give him the conscientious objector classification. (R 46) The question presented here is was there a duty upon or assumed by the agent or any government official to do more for this registrant than for the ordinary one? The ordinary one gets a post-card notice.

Appellant will argue that the factual situation here presented should persuade the Court to hold that having gone as far as he did the F.B.I. agent should also have informed the registrant about the administrative appeal requirement. This is so because it was obvious to anyone as familiar with selective service religious objectors as an F.B.I. agent assigned to this work, that if the local board rejected the registrant's claim, the registrant was an inevitable candidate for federal prison.

Appellant will also argue that he had reason to repose confidence in the F.B.I. agent, the official who obviously had power to arrest and confine him, the official who was friendly, informative and who assumed the role of counsellor. The F.B.I. agent set the stage for appellant

to rely on him. Appellant had no other advisor. Nor were there official Advisers to Registrants. These points will be gone into again hereinafter in more detail to the conclusion that if the agent had not assumed the role of adviser appellant would undoubtedly have consulted his father's attorney as his father suggested. (R 47) That because of the above he relied and continued to rely on the F.B.I. agent. (R 47)

A. In the first place, the Selective Service regulations themselves recognize that registrants are not the kind of persons who have a familiarity with administrative or legal process or who are accustomed to seek legal advice, that is, if they have to pay a fee for it. Section 1604.41 (32 C.F.R.) provides for official Advisors to Registrants. (See below) Although the record in this case contains no mention of this advisor official, this Court knows that the local boards uniformly ignored the provision for such officials and the further provision that their names and addresses be posted.

In the following decisions of this Court this fact is clear, on the pages hereafter noted: *Chernekoff* v. *United States,* 219 F. 2d 721 at 724; *Kaline* v. *United States,* 235 F. 2d 54 at 58; *Mason* v. *United States,* 218 F. 2d 375 (see opinion denying Petition for Rehearing); *Uffelman* v. *United States,* 230 F. 2d 297, 301.

In *Davidson* v. *United States,* 218 F. 2d 809, the Record, at page 42, gives the testimony of Col. Hartwell, assistant deputy director of Selective Service for the State of California, on November 18, 1953:

> "The Witness: We have—while we don't in this state have that which under Section 1604.41 appears

to be discretionary, as to the appointment of advisors to registrants, we do not have them set up as such. We call them registrars. But they perform the same duties as the advisor to a registrant.

Q. (By Mr. Tietz) In other words, you would say that in the State of California there is no official designated as an advisor to a registrant, as provided in Section 1604.41?

A. Under my jurisdiction, I don't think that we have any here.

Q. And at no time during the processing of this defendant, which started in 1948, did Local Board No. 89 have such an official?

A. As designated."

Further, after this Court and others had a considerable number of cases where the failure of the boards to comply with this provision was made an issue the regulation was amended to change the provision from mandatory ("shall be appointed") to discretionary ("may") on 15 February 1955.

"Advisors to Registrants.

1604.41 Appointment and Duties.—Advisors to registrants may be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office."

Appellant's point does not depend upon whether the provision was mandatory or not; he is showing only that the need for advisors has always been recognized by the Selective Service System itself and that the Court may take judicial notice that the California boards had none.

B. The intent of Congress was to raise an army and to get conscientious objectors into civilian work that contributes to the national health, welfare and interest. (U.M.T. & S. Act, Sec. 6(j)). To allow registrants needlessly to head into prison is to subvert the Act. No one meeting appellant ever doubted his sincerity (except possibly the prosecutor) or his firm intent to refuse military service. For these reasons and because of the advisory conduct and relationship of the F.B.I. agent to this registrant it therefore became incumbent on the officials to inform him that an administrative appeal was a required step, once the local board rejected his claim and evidence. Under the circumstances a post card notice with fine print referring to 10 days to appeal is not enough of a discharge of this obligation. His draft history showed that he had the fixed idea that he would do only what Mr. Groves told him was required of him. (R. 47) It was certainly morally wrong to let him head straight for prison, without a specific warning concerning appellate necessity. The Court is asked to declare that it was also legally wrong.

C. This Court, and others, have spoken on the type of judicial consideration that is to be accorded registrants who have not precisely obeyed procedural requirements.

Cox v. *Wedemeyer,* 192 F. 2d 920, where this Court pointed out:

"* * * None of them (is) represented by counsel." (923) and

Ex parte Fabiani, 105 F. Supp. 147, where Judge McGranery declared:

> "The different objective to be achieved by the new Act behooves us to employ a more liberal standard of judicial review, so as better to protect the rights of the individual. Should—which God forbid—world tensions increase greatly or should general war come, then the judicial arm can once again cut to the barest minimum its supervision of the operations of the draft." (146-147) and

United States v. *Underwood,* SD W.Va., 4/27/56, No. 754 where Judge Moore said:

> "We know from the evidence that he wanted to make the claim and we don't find that the clerk told him how to make it. He and his father went to the clerk and there is no record that the clerk told them to apply to the board."

D. Appellant does not claim that the F.B.I. agent consciously misled or lulled him into security. He does claim that this was the effect. He believes that the failure to warn him of the necessity for an appeal should be weighed in favor of relaxing the rule. As mentioned hereinabove appellant relied on the agent for guidance. (R. 47) This Court, in *Evans* v. *United States,* 252 F. 2d 509, indicates that a case might arise where the Court would be inclined to relax the rule; that the condition required for such a relaxing might be that the registrant claims he was not aware of his right to appeal. Appellant received the

standard post-card notice, but he asserts that his continued relationship with the F.B.I. agent and his expressed reliance on the agent's advice justified him in believing in general that the agent would not let him become needlessly entrapped; and specifically that the agent would inform him of a necessity such as an administrative appeal just as the agent did inform him of the necessity for doing the many other things the agent again and again brought to his attention. (R. 47)

Appellant believes that when the F.B.I. undertakes to advise a selective service registrant on procedural matters it should be required to advise him more fully than was done here.

A somewhat analogous situation was decided by Judge Underwood in *United States* v. *Carleton,* (SD Ohio) Crim. No. 6030 on October 24, 1951. There, the agent procured a waiver from the registrant, wherein he withdrew his claim for a conscientious objector classification and relied solely on his claim for a minister's classification, as one of Jehovah's witnesses. In finding the defendant not guilty Judge Underwood concluded:

> "The waiver which defendant signed was not effective because he did not fully understand the consequences." (Slip op. p. 3)

Some features of appellant's case may be speculative or debatable but it is certain that he did not understand he had to ask the local board to send his file to the appeal board or else have his mouth shut from then on.

Appellant asks the Court to declare that when government officials are dealing with a registrant under circum-

stances like those of this case the postcard notice is not enough; that either the registrant should be specifically told of the necessity for an administrative appeal or that the rule requiring exhaustion of administrative remedies be relaxed.

II.

The Denial of the Conscientious Objector Status Was Without Basis in Fact.

Section 6(j) of the act (50 U.S.C. App., § 456(j), 65 Stat. 75, 83, 86) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief, in this connection, means an individual's belief in a relation to a Supreme Being, involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

Section 1622.14 of the Selective Service Regulations (32 C.F.R., § 1622.14) provides:

> "Class I-O: *Conscientious objector available for civilian work contributing to the maintenance of the national health, safety, or interest.*
>
> —(a) In Class I-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to participation in war in any form and to be conscien-

tiously opposed to participation in both combatant and noncombatant training and service in the armed forces."

Section 1622.11 provides:

> "Class I-A-O: *Conscientious Objector Available for Noncombatant Military Service Only.*—(a) In Class I-A-O shall be placed every registrant who would have been classified in Class I-A but for the fact that he has been found, by reason of religious training and belief, to be conscientiously opposed to combatant training and service in the armed forces."

The attitude of the Selective Service System and of the court below, concerning whether there was a basis in fact for the classification was grounded upon error. To begin with, it ignores the doctrine of *Dickinson* v. *United States,* 346 U.S. 389 (1953). That decision requires that the board, "* * * must find and record affirmative evidence that he has misrepresented his case * * *"—346 U.S., pp. 396-397, 399 (dissenting opinion). And it also ignores the doctrine of *Witmer* v. *United States,* 75 S.Ct. 392 (1955), wherein the yardstick of sincerity is made the law. Absent any finding recorded that questions it, the *Dickinson* doctrine controls.

Congress says that a man is a conscientious objector if he (1) believes in a Supreme Being, (2) conscientiously opposes participation in the armed forces by combatant or noncombatant service, and (3) bases such objection on religious training and belief. The appellant concededly believed in a Supreme Being. He opposed participation in the armed forces. He based those objections on his religious training and belief.

The evidence submitted by the appellant established at least *prima facie*[1] that he had sincere and deep-seated conscientious objections against participation in combatant and also noncombatant military service and that these objections were based on his "relation to a Supreme Being involving duties superior to those arising from any human relation." This material also showed that his belief was not in the least based on "political, sociological, or philosophical views, or a merely personal moral code"; that it was entirely based upon his religious training and belief as one of the Molokans. (Ex 66)

The Selective Service System raised no question [none is recorded] concerning the *veracity* of the petitioner. The question therefore is not one of fact, but is one of law; *Dickinson* v. *United States, supra.* The law and the facts in his file, at least *prima facie,* establish that petitioner is a conscientious objector opposed to combatant and noncombatant service.

In view of the fact that there is no contradictory relevant evidence in the file, disputing appellant's statements as to his conscientious objections, and there is no question of veracity presented, the problem to be determined here by this Court, appellant repeats, is one of law rather than one of fact. The question to be determined is: Was the decision (that the evidence did not

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[1]The language of *Dickinson* is:

"But when the uncontroverted evidence supporting a registrant's claim places him *prima facie* within the statutory exemption, dismissal of the claim solely on the basis of suspicion and speculation is both contrary to the spirit of the Act and foreign to our concepts of justice.

"Reversed." [74 S. Ct. 152, 158].

prove appellant was a conscientious objector opposed to both [or either] combatant and noncombatant military service) arbitrary, capricious and without basis in fact?

The undisputed documentary evidence in the file showed that the appellant was conscientiously opposed to participation in combatant and noncombatant military service. This showing brought him squarely within the statute and the regulation providing for classification as a conscientious objector. This entitled him to exemption from combatant and noncombatant military training and service.

There is absolutely no evidence whatever in the draft board file that appellant was willing to do military service. All of his papers, and every document supplied by him, staunchly presented the contention that he was conscientiously opposed to participation in both combatant and noncombatant military service. Never, at any time, did the appellant suggest to the Selective Service System, or even imply, that he was willing to perform any military service. He, at all times, contended that he was unwilling to go into the armed forces and do anything as a part of the military machinery.

It has been held by many courts of appeal that the rule laid down in *Dickinson* v. *United States, supra,* (holding that if there is no contradiction of the documentary evidence showing exemption as a minister, there is no basis in fact for the classification) also applies in cases involving other claims.

Weaver v. *United States,* 8th Cir., 1954, 210 F.2d 815, 822-823;

Taffs v. *United States,* 8th Cir., 1953, 208 F.2d 839, 331-332;
United States v. *Hartman,* 2d Cir., 1954, 209 F.2d 366, 368, 369-370;
Pine v. *United States,* 4th Cir., 1954, 212 F.2d 93, 96;
Jewell v. *United States,* 6th Cir., 1953, 208 F.2d 770, 771-772;
Schuman v. *United States,* 9th Cir., 1953, 208 F.2d 801, 802, 804-05;
Jessen v. *United States,* 10th Cir., 1954, 212 F.2d 897, 900;
United States v. *Close,* 7th Cir., 1954, *supra;*
United States v. *Wilson,* 7th Cir., 1954, 215 F.2d 443, 446;
contra United States v. *Simmons,* 7th Cir., 1954, 213 F.2d 901.

Simmons was reversed by the Supreme Court on March 14, 1955, *Simmons* v. *United States,* 75 S.Ct. 397. The reversal was on other grounds, however and it remained for *Witmer,* 75 S.Ct. 392, to settle the point. In *Witmer,* it was held that the inconsistent statements and positions of the registrant, gave the Selective Service System a basis in fact for disbelieving his sincerity and denying his claim for a conscientious objector classification. The Court referred to the Department of Justice findings that Witmer had retreated from one deferred claim to another (for a total of three claimed statuses) and had made inconsistent statements, and had offered to contribute to the war effort [395].

Appellant Prohoroff's file cannot be fairly charged with containing any of the above flaws. He was entitled to at least a I-A-O conscientious objector classification.

That he might have turned it down, was no excuse for not giving it to him. See *Franks* v. *United States*, 9th Cir., 216 F.2d 266, 269.

In *Jessen* v. *United States,* 10th Cir., 1954, *supra,* 900, after quoting from *Dickinson, supra,* the Court said:

> "Here, the uncontroverted evidence supported the registrant's claim that he was opposed to participation in war in any form. There was a complete absence of any impeaching or contradictory evidence. It follows that the classification made by the State Appeal Board was a nullity and that Jessen violated no law in refusing to submit to induction."

A conscientious objector *believes,* and governs his professions and conduct accordingly. The relevant evidence is all on *one* side, Prohoroff's. His veracity was never questioned.

There must be an affirmative finding that his evidence lacked credibility. "It is hard to see how the board could have refused a deferment under the case of *Dickinson* v. *United States,* 346 U.S. 389, unless there was an affirmative finding that the evidence lacked credibility." *United States* v. *Williams,* No. 8917 Criminal, D. Conn., April 2, 1954, Judge J. Joseph Smith. And see *United States* v. *Peebles*, 7th Cir., 220 F.2d 114, 119, and cases cited. Also *Weaver* v. *United States, supra, Jewell* v. *United States, supra, Hagaman* v. *United States,* 3d Cir., 213 F.2d 86, *United States* v. *Izumihara,* D. Hawaii, 120 F.Supp. 36, *United States* v. *Close*, 7th Cir., *supra.*

This phase of Prohoroff's case is similar to a case decided by this Court in 1954. In *Shepherd* v. *United States*, 9th Cir., 217 F.2d 942, we read:

"However, this case differs in an important particular from the Hinkle case where we pointed out that there was no suggestion of any sham or fakery on the part of Hinkle whose beliefs and views were admittedly sincere and genuine. Here it is to be noted the Department's recommendation of a denial of exemption was based upon a disbelief in Shepherd's honesty and sincerity as well as upon the legal conclusions that he could not be a conscientious objector because of his belief in self defense and in theocratic war." [945]

To repeat, and conclude, no one has questioned Prohoroff's sincerity, or attempted to rebut his *prima facie* case.

III.

Appellee Failed to Establish Geographical Jurisdiction in Local Board 71.

The subject of geographical jurisdiction has always been given serious consideration in selective service prosecutions. *Anderson* v. *United States,* 66 S. Ct. 483; *Johnston* v. *United States*, 76 S. Ct. 739.

It is firmly established that an invalid order of a local board affords no basis for a conviction. It is a corollary that a local board must have initial geographical jurisdiction before it can issue a valid order. This is also the clear meaning of the selective service regulations:

1613.12 Instructions Concerning Completion of Registration Card.—(a) The registrar shall take extreme care that the place of residence of the registrant is correctly entered on line 2 of the Registration Card (SSS Form No. 1). The local board having jurisdiction

over the place of residence entered on line 2 of the Registration Card (SSS Form No. 1) shall always have jurisdiction over the registrant, unless otherwise directed by the Director of Selective Service. The registrar shall require the registrant to give sufficient information as to the location of the place of his residence to establish such place within the jurisdiction of a local board. The registrant shall not be permitted to give a place of residence outside of the several States of the United States, the District of Columbia, the Territory of Alaska, the Territory of Hawaii, Puerto Rico, the Virgin Islands, Guam, or the Canal Zone. In describing his place of residence, the registrant shall give the street number thereof, when used, and in every case he shall give the name of the town, township, village, or city, and the county and State in which it is located. No R. F. D. route number shall be sufficient unless it is supplemented by more particular information showing where the place of residence is located on the R. F. D. route. The registrant shall be permitted to determine what place he desires to give as his residence when he is not located in the same place all of the time. (32 C.F.R., Sec. 1613.12)

This is also the conclusion of the Eighth Circuit wherein the court declared "The local board of defendant's residence had jurisdiction." *Doty* v. *United States,* 218 F. 2d 93, 96.

This also seems to be the view of the Supreme Court, in *Estep* v. *United States,* 66 S. Ct. 423, wherein we read:

> "It is only orders 'within their respective jurisdictions' that are made final. It would seem, therefore, that if a Pennsylvania board ordered a citizen and resident of Oregon to report for induction, the defense

that it acted beyond its jurisdiction could be interposed * * *."

It also follows that it is an essential part of a prosecution to show said geographical jurisdiction, after the defendant presents evidence to preclude the application of the doctrines of official regularity and judicial notice. This was recognized by appellee when it accepted the trial court's invitation to reopen its case for such purpose. (R 14)

This point, as raised, is apparently one of first impression in a draft case, the only authority found, bearing on the subject, being *United States* v. *Kemler*, 44 F. Supp. 649, wherein the court held:

> (10) Further, in this connection, there is no sufficient allegation in the indictment that the defendant was within the jurisdiction of Selective Service Board Number 128, Revere, Suffolk County, Massachusetts. Certainly, it was essential that he should be, in order to commit the offense charged. If the defendant was not within the jurisdiction of this Board any report Dr. Musgrave might make would not be within his official function. (652)

The Selective Service regulations (32 C.F.R.) provide that the county shall be divided into local board areas:

> LOCAL BOARDS.
>
> 1604.51 Areas.—The State Director of Selective Service for each State shall divide his State into local board areas. Normally, no such area should have a population exceeding 100,000. There shall be at least one separate local board area in each county; provided, that an intercounty local board may be established for

an area not exceeding five counties within a State when the Director of Selective Service determines, after considering the public interest involved and the recommendation of the Governor, that the establishment of such local board area will result in a more efficient and economical operation.

1604.54 Jurisdiction.—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law.

It is submitted that the Act itself (U.S.C., Title 50, App. Sec. 10 (b) (3)) completely clarifies the point appellant is relying on:

"Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the *respective* jurisdictions of such local boards to hear and determine * * *" (Italics supplied).

Appellant introduced evidence to show that there were four local boards officed together in the city of Fresno. (R 12) This precluded application of the doctrine of official regularity, and, as recognized by appellee (R 14) necessitated a showing that Local Board No. 71 was the board that had jurisdiction over appellant. Additionally, judicial notice that appellant's residence was in the area of Local Board No. 71 would have been permissible only if the county had one local board. This was recognized by the trial court. (R 14, 20) The judge therefore invited appellee to reopen its case and present evidence.

Appellee's first attempt (after an abortive effort to persuade appellant to stipulate away this defense, R 13), was to use Area Coordinator Hathaway. This attempt foundered when it became evident that the boundary map was made from a legal description attached to a letter from Col. Lyman dated 1953 and the undisputed evidence was that appellant had registered in 1952. (R 19) The Col. Lyman letter was part of Exhibit marked 2 for identification (R 20) and was withdrawn by the appellee at the close of all argument. (R 35)

Appellee's next attempt was to use Mrs. Ford, Group Coordinator for the Local Board Group. (R 22)

She testified that she was and had been in charge of the draft board office since 1948 (R 22); that the white typewritten sheet in Exhibit 2 was in the office during her entire period of service and that she made the large map from it in 1949. (R 25-26) Appellant objected to this evidence on the ground that there was insufficient foundation to show that it was official; that the white sheet didn't have even the rather limited authentication that had been furnished for the blue sheet in Exhibit 2; it had been shown that the blue sheet was the work of a Selective Service official, Colonel Lyman. (R 16)

The testimony of appellant's witness Ford showed that the white sheet description had nothing on it to show it was the official product of state headquarters other than the "*belief*" of the witness that it came from the state office. (R 24)

Without these documents, admitted into evidence later (R 35), there concededly would have been no basis what-

ever for the trial court to conclude that Local Board 71 had jurisdiction over appellant.

Appellant submits that his objection to the admission of these documents should have been sustained. These documents were not ancient (in California a document must be 30 years old to be presumed to be genuine: California Code of Civil Procedure, Sec. 1945); nor were they of general notoriety or interest, nor had defendant at any time admitted their execution, nor had they ever been in his possession. All these documents were concededly recently manufactured and more adequate foundation concerning their correctness could easily have been furnished by the State Director of Selective Service. The fact that the sheet of paper bore a heading "Local Board No. 71" and a territorial description does not sufficiently indicate it was the boundary officially determined by the State Director. Nor does the additional evidence (R 32) that it "came from state headquarters in 1948" supply the deficiency. Surely some kind of authentication should have been attached to it or certified on it or testified to by a state headquarters official. The document describing boundaries could so easily have been a tentative draft and even if there had been testimony that it was a final draft there should have been evidence to show that it had been compared with the state director's official records or his master copy.

CONCLUSION.

The judgment of the Court below should be reversed.

Respectfully submitted,

J. B. Tietz,

Attorney for Appellant.

APPENDIX A.

Index of Exhibits in Record

	Identified	Offered	Received
Plaintiff's Exhibit No. 1 ..... (Selective Service file of Prohoroff)	10	10	10
Plaintiff's Exhibit No. 2 ..... (Boundary description)	20, 24-25	34	35
Plaintiff's Exhibit No. 3 ..... (Large map)	28	34	35
Plaintiff's Exhibit No. 4 ..... (Small map)	28	34	35

No. 15911

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BILL WILLIAM PROHOROFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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No. 15911

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BILL WILLIAM PROHOROFF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

I.
JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on October 9, 1957, under Section 462 of Title 50, United States Code, Appendix, for knowingly refusing and failing to report for induction into the Armed Forces of the United States as ordered to do. [Tr. 3-4.]

After the appellant was arraigned and pleaded not guilty, the appellant was tried in the United States District Court for the Southern District of California, Northern Division, before the Honorable Gilbert H. Jertberg without a jury on December 30, 1957, and at the close of evidence and argument Judge Jertberg found the defendant guilty as charged. [Tr. 9-39.]

On January 20, 1958, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of six months. [Tr. 5-6.]

The District Court had jurisdiction of the cause of action under 50 U. S. C., Appendix 462, and 18 U. S. C., 3231.

II.
STATUTE INVOLVED.

The Indictment in this case was brought under Section 462 of Title 50, Appendix, United States Code, which provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451-470 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.
STATEMENT OF THE CASE.

The Indictment returned on October 9, 1957 charges that the appellant was duly registered with Local Board No. 71 in Fresno, California; he was classified I-A; he was ordered to report for induction into the Armed Forces of the United States on October 12, 1956 in Fresno, California; and at that time and place he knowingly failed and neglected to report for induction into the Armed

Forces of the United States as so notified and ordered to do. [Tr. 3-4.]

After arraignment and a plea of not guilty, the appellant was tried before Honorable Gilbert H. Jertberg without a jury on December 30, 1957, at which time he was found guilty as charged in the Indictment. [Tr. 9-39.]

On January 20, 1958, appellant was sentenced to the custody of the Attorney General for imprisonment for a period of six months. [Tr. 5-6.]

Appellant assigns as error the Judgment of conviction on the following grounds:

(1) The District Court erred in failing to grant the Motion for Judgment of Acquittal;

(2) The District Court erred in convicting the appellant and entering a judgment of guilty against him. (App. Br. p. 5.)

IV.
STATEMENT OF THE FACTS.

December 30, 1952, appellant registered with Local Board 71 in Fresno, California. [Ex. 1, 2.]*

February 24, 1953, appellant wrote to Board 71 stating that there was no reason for him to fill out the Classification Questionnaire as he would not take part in any war. [Ex. 16.]

March 5, 1953, appellant returned to Board 71 his Classification Questionnaire (SSS Form 100) in which it appears that he signed Series XIV indicating he had

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*Ex. refers to Government's Exhibit 1: The Appellant's Selective Service file.

conscientious objection to war, and then scratched out his signature. [Ex. 7-13.]

March 5, 1953, appellant returned the notarized affidavit of dependency (SSS Form C-95) which Board 71 had mailed to him. [Ex. 17-18.]

March 12, 1953, appellant classified I-A by a vote of two to nothing by Board 71. [Ex. 14.]

March 13, 1953, appellant notified (SSS Form 110) of his I-A classification. [Ex. 14.]

April 2, 1953, appellant ordered to report for his pre-induction physical examination (SSS Form 223) at Fresno, California on April 17, 1953. [Ex. 20.]

April 17, 1953, appellant failed to report for his pre-induction physical examination as ordered. [Ex. 14, 31.]

April 29, 1953, Board 71 wrote to the individual that appellant had indicated would always know his (appellant's) address requesting appellant's present address which was furnished on May 4, 1953. [Ex. 29-30.]

May 5, 1953, Board 71 wrote to appellant advising him to either report immediately to Board 71 or request a transfer to the board nearest to his new address in order to comply with the order to take his pre-induction physical examination. [Ex. 31.]

May 19, 1953, Board 71 wrote to appellant's father requesting him to furnish the appellant's present address. [Ex. 33.]

June 4, 1953, Board 71 voted two to nothing to order appellant to report for immediate induction as a delinquent. [Ex. 14.]

June 9, 1953, Board 71 ordered appellant to report for induction (SSS Form 252) as a delinquent on June 19, 1953 in Fresno, California. [Ex. 34.]

June 19, 1953, appellant failed to report for induction as ordered. [Ex. 14.]

June 26, 1953, Board 71 reported appellant to the United States Attorney, Los Angeles, California as a delinquent. [Ex. 35-36.]

December 14, 1953, the United States Attorney after reviewing appellant's file returned the case to Board 71 for further action on the grounds that it appeared from the file that appellant may have indicated he had conscientious objections to war and should be given the opportunity to state his position. [Ex. 44.]

December 17, 1953, Board 71 mailed appellant Special Form for Conscientious Objector (SSS Form 150.) [Ex. 46-49.]

December 23, 1953, Board 71's letter of December 17, 1953 was returned to Board 71 by the Post Office marked "Gone—no address". [Ex. 50.]

December 24, 1953, Board 71 wrote to the individual that appellant had indicated would always know his (appellant's) address requesting appellant's present address, and this letter was returned by the Post Office marked: "Person unknown". [Ex. 51-52.]

January 14, 1954, Board 71 wrote to appellant's father requesting appellant's present address. [Ex. 53.]

January 21, 1954, appellant sent Board 71 his new address. [Ex. 54.]

January 28, 1954, Board 71 sent Special Form for Conscientious Objector (SSS Form 150) to appellant. [Ex. 14.]

January 28, 1954, Board 71 ordered appellant to report for his pre-induction physical examination (SSS Form 223) on February 4, 1954, at Fresno, California. [Ex. 55.]

February 4, 1954, appellant failed to report for his pre-induction physical examination as ordered. [Ex. 14.]

February 12, 1954, Board 71 received a letter from appellant in which he states he wants nothing to do with the armed forces, and that he and his people are planning to leave the United States. [Ex. 56.]

February 18, 1954, appellant classified I-A by Board 71 by a vote of three to nothing. [Ex. 14.]

February 19, 1954, appellant notified (SSS Form 110) of his I-A classification. [Ex. 14.]

August 13, 1954, Board 71 ordered appellant to report his pre-induction physical examination (SSS Form 223) on August 20, 1954 at Fresno, California. [Ex. 58.]

August 20, 1954, appellant failed to report for his pre-induction physical examination as ordered. [Ex. 14.]

November 18, 1954, Board 71 voted three to nothing to order appellant to report for induction as a delinquent. [Ex. 15.]

January 25, 1955, Board 71 ordered appellant to report for induction into the armed forces on February 14, 1955 at Fresno, California. [Ex. 60.]

February 14, 1955, appellant failed to report for induction as ordered. [Ex. 15.]

April 29, 1955, Board 71 reported appellant to the United States Attorney in Los Angeles, California, as a delinquent. [Ex. 61-62.]

August 4, 1955, appellant personally appeared at Board 71 and requested "Special Form for Conscientious Objector (SSS Form 150)" which was handed to him and completed by him then and there. [Ex. 15, 63-67.]

August 17, 1955, the United States Attorney declined to prosecute appellant because he was now in touch with his local board. [Ex. 68.]

September 15, 1955, Board 71 by a vote of two to nothing reopened appellant's classification and classified him I-A. [Ex. 15.]

September 16, 1955, Board 71 notified appellant (SSS Form 110) of his I-A classification. [Ex. 15.]

January 9, 1956, Board 71 ordered appellant to report for his pre-induction physical examination (SSS Form 223) on January 19, 1956 at Fresno, California. [Ex. 69.]

January 24, 1956, Board 71 mailed appellant a Certificate of Acceptability (SSS Form DD62) certifying that as a result of the physical examination he took on January 19, 1956 he was found fully acceptable for induction into the armed forces. [Ex. 70.] This letter was returned to Board 71 by the Post Office on January 30, 1956. [Ex. 96.]

January 31, 1956, Board 71 wrote to the individual that appellant indicated would always know his (appellant's) address requesting appellant's present address. [Ex. 97.]

February 3, 1956, Board 71 telephoned appellant's father requesting appellant's present address. [Ex. 98.]

February 8, 1956, Board 71 wrote to appellant's father requesting appellant's present address which was furnished to Board 71 on February 15, 1956. [Ex. 99.]

February 21, 1956, Board 71 remailed the Certificate of Acceptability (SSS Form DD62) to appellant. [Ex. 15, 96.]

August 13, 1956, Board 71 mailed appellant a Dependency Questionnaire (SSS Form 118) which appellant returned to Board 71 on August 21, 1956, and in which he indicated that no one was dependent upon him. [Ex. 101-104.]

September 6, 1956, Board 71 reviewed appellant's case and voted three to nothing for no change. [Ex. 15.]

September 19, 1956, Board 71 ordered appellant to report for induction into the Armed Forces of the United States (SSS Form 252) on October 12, 1956 at Fresno, California. [Ex. 105.]

October 12, 1956, appellant failed to report for induction as ordered. [Ex. 15.]

V.
ARGUMENT.
POINT ONE.

Appellant Was Not Entitled to Judicial Review of His I-A Classification Because He Failed to Exhaust His Administrative Remedies.

As seen from the statement of facts given above the appellant did not appeal from the last I-A classification given to him by his local board on September 15, 1955, and he did not report to the induction center for induction into the Armed Forces of the United States on October 12, 1956, as ordered. Failure to either appeal the last classification or report to the induction center when ordered to report for induction is a failure to exhause administrative remedies.

Falbo v. United States, 320 U. S. 549, 64 S. Ct. 346 (1944);

Billings v. Truesdell, 321 U. S. 542, 64 S. Ct. 737 (1944);

Olinger v. Patridge, 196 F. 2d 986 (9th Cir. 1952);

Williams v. United States, 203 F. 2d 85 (9th Cir. 1953);

Rowland v. United States, 207 F. 2d 621 (9th Cir. 1953);

Skinner v. United States, 215 F. 2d 767 (9th Cir. 1954);

Kalpakoff v. United States, 217 F. 2d 748 (9th Cir. 1954);

Francy v. United States, 217 F. 2d 750 (9th Cir. 1954);

Mason v. United States, 218 F. 2d 375 (9th Cir. 1955);

Kaline v. United States, 235 F. 2d 54 (9th Cir. 1956);

Evans v. United States, 252 F. 2d 509 (9th Cir. 1958).

Appellant concedes that he did not exhaust his administrative remedies. (App. Br. p. 7.)

POINT TWO.

Appellant Is Not and Should Not Be Exempted From Exhausting His Administrative Remedies.

Appellant argues that the exhaustion of administrative remedies rule should not be applied to him. The reason given for this position appears to be that the evidence shows appellant relied on advice given to him by an F.B.I. agent, and said advice effectively "misled or lulled" appellant to the point that appellant did not appeal. Of course this does not explain why appellant did not report to the induction center.

The appellee opposes this argument on the following grounds:

(1) There is no evidence that appellant was ever advised by any F.B.I. agent at any time.

(2) This defense is raised for the first time on appeal.

(3) Assuming an F.B.I. agent did advise appellant, and this issue was properly raised in the trial court, it still would not be grounds to prohibit the application of the rule of exhaustion of administrative remedies to appellant.

This case was tried and decided on December 30, 1957. Appellant's defenses appear in his Motion for Judgment of Acquittal. [Tr. 4-5.] Appellant did not testify at the trial of this case in the District Court. At no time prior to or during the trial was there ever any testimony, evidence, motions, or stipulations that even remotely pertain to any conversations between appellant and an F.B.I. agent. At the conclusion of the trial on December 30, 1957, appellant was found guilty.

On January 20, 1958, appellant appeared before the trial court for sentence. [Tr. 39.] After the court heard from counsel and just prior to imposing sentence, the court asked if appellant had anything to say. [Tr. 43.] At this time, appellant, while not under oath, told the court his interpretation and recollection of purported conversations he had with F.B.I. agents at different times between December 1952, and December 1956. The Government was unprepared and thus unable to rebut these statements at the time. Of course these statements are not evidence and were not offered by appellant as evidence. It is equally clear at this point that this matter is being raised for the first time on appeal, and hence, should be disregarded by this Court.

Let us assume this defense was raised at the time of trial, and let us further assume that an F.B.I. agent had advised appellant along the lines appellant claims [Tr. 43-48], and that appellant had relied on this advice. Even then appellant's position is untenable. Appellant's argument is that the agent advised him correctly as far as he went but did not advise him completely as he did not tell appellant that appellant could appeal his classification. (App. Br. pp. 12-13.) Appellant admits receipt of Notices of Classification (SSS Form 110), or as

appellant calls them "standard post-card notices", each of which clearly states that he has ten days in which to appeal his classification. (App. Br. pp. 11, 13.) [Tr. 46.] On three separate occasions such notices were sent to appellant: in 1953, 1954 and 1955. [Ex. 14-15.]

Apparently all of these alleged conversations with an F.B.I. agent took place prior to August 4, 1955, which is the date appellant went to Board 71, obtained a Special Form For Conscientious Objector (SSS Form 150), completed it, and left it with Board 71. [Tr. 43-48, 64.] While at the Board appellant did not inquire as to his rights to appeal his classification. After this visit to Board 71, appellant's classification was reopened by Board 71, he was again classified I-A, and he was sent a notice of his classification (SSS Form 110) which advised him he had ten days in which to appeal the classification. [Ex. 15.] It appears then that the agent purportedly did not tell appellant be could appeal (and it is not even claimed that the agent told appellant he could *not* appeal or need *not* appeal), and that Board 71 notified appellant three times of his right to appeal, and at least one such notice was sent appellant after the last conversation appellant allegedly had with the agent. Yet appellant argues he relied on what the agent told him. Obviously, what is meant is that appellant relied on what the agent did not tell him while choosing to disregard the Board's information. Although we do not know of any situation where a registrant should be exempted from the necessity of exhausting his administrative remedies, and we know of no appellate decisions allowing such an exemption, it is clear that appellant herein should not be so exempted.

This Court in *Evans v. United States*, 252 F. 2d 509 (1958), was urged by this same defense counsel to exempt *Evans* from the exhaustion of administrative remedies rule, and the Court while affirming the conviction stated:

> "Appellant recognizes the burden he has here in view of the 'exhaustion of remedies' rule and our holdings applying it in selective service cases (footnote 2), but he urges upon us that the doctrine is not inflexible and may be relaxed by courts in proper places. Assuming the correctness of this contention, we doubt that we should be anxious to relax the rule in this case where appellant makes no claim that he was not aware of his rights to appeal but instead admits that the document bringing him notice of the classification also notified him of his right to take an appeal from the classification within ten days."

POINT THREE.

There Is a Basis in Fact for Appellant's Classification.

If the court holds that appellant had to exhaust his administrative remedies then this point is of course moot and need not be considered.

32 C. F. R. 1622.1(c) provides:

> "It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. . . ."

It is apparent from the foregoing regulation that the burden was on appellant to establish his exemption from

military service. *Gaston v. United States,* 222 F. 2d 818 (4th Cir. 1955). The controlling case as to whether or not appellant satisfied this burden and whether or not there was a basis in fact for the board's classification is *Witmer v. United States,* 348 U. S. 375 (1955). In that case the Supreme Court affirmed the conviction of a registrant who had failed to submit to induction after his claim as a conscientious objector had been denied. The Court said at page 381:

> "Petitioner argues from this that there was no specific evidence herein compatible with his claimed conscientious objector status. But in Dickinson (346 U. S. 389) the registrant made out his *prima facie* case by means of objective facts—he was 'a regular or duly ordained minister in religion.' Here the registrant cannot make out a *prima facie* case from objective facts alone, because the ultimate question in conscientious objector cases is the sincerity of the registrant in objecting, on religious grounds, to participation in war in any form. In these cases, objective facts are relevant insofar as they help in determining the sincerity of the registrant in his claimed belief, purely a subjective question. In conscientious objector cases, therefore, any fact which cast doubt on the veracity of the registrant is relevant . . . in short, the nature of a registrant's *prima facie case* determines the type of evidence needed to rebut his claim."

It is clear from this language that when a registrant claims to be a conscientious objector his "sincerity" in making such a claim is controlling, and a board may look to the registrant's objective acts to determine his state of mind.

The indisputed evidence concerning appellant's course of action over a four-year period in relation to his local board is that he: failed to register on time; failed to report for a pre-induction physical examination on three different occasions; failed to report for induction on three different occasions; failed to notify the local board of his change of address on at least three different occasions; and failed to complete and return the Special Form for Conscientious Objector (SSS Form 150) which was sent to him on two occasions. In light of these objective acts any local board would be justified in doubting appellant's sincerity.

The appellant states in his brief (p. 7) that appellant's conduct is susceptible of the view that appellant is a "slacker", and that the local board found him to be an "evader" (p. 6). Yet appellant would argue these appellations are consistent with religious sincerity. We contend that such an argument overlooks the meaning of the words when the objective to be determined is whether or not appellant is "sincere". And even if appellant's counsel can manipulate these appellations and the appellant's objective acts in such a fashion as to demonstrate that it is conceivable that someone could hold these appellations and objective acts consistent with a sincere claim of conscientious objector status, it is still apparent that the local board was in fact justified in concluding that appellant was insincere and thus not entitled to a I-O or I-AO classification. Appellant has the burden of establishing his sincerity, and there is no evidence of any kind which indicates he sustained this burden.

Appellee does not intend to discuss at length the scope of judicial review of the board's classification. It has long been settled:

> "That the Courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. Decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."
>
> *Estep v. United States,* 327 U. S. 114, 66 S. Ct. 423 (1946).

POINT FOUR.

The Geographical Jurisdiction of Board 71 Included Appellant's Residence Address at the Time He Registered.

There are several preliminary issues that should be determined before deciding whether or not the appellee proved that the appellant's resident's address at the time he registered was without the "geographical jurisdiction" of the ordering local board.

It is to be noted that we are not here concerned with whether or not the trial court had jurisdiction over the subject matter and/or appellant at the time of trial, which admittedly is an essential element of a criminal prosecution. This type or form of jurisdiction of the trial court is admitted and was proven at the time of trial. But, rather the issue here is the existence of "geographical jurisdiction" of the local board to act in regard to appellant.

Who has the burden of proving or disproving this "geographical jurisdiction" of a local board? Can this issue be raised at the time of trial by a registrant who did not exhaust his administrative remedies? What is the distinction if any between this so called "geographical jurisdiction" of the local board and any other kind of "jurisdiction" over the registrant the local board may have? Can this "geographical jurisdiction" be waived by a registrant?

A registrant registers with a particular local board, and then for a period in excess of four years he deals only with this same local board, during which time he never challanges the "jurisdiction" of this board. Then, when he refuses to obey an order of this local board (and not on grounds of lack of "jurisdiction"), the matter comes to trial in the District Court, and there for the first time he claims the local board he dealt with was without "geographical jurisdiction" over him.

"Geographical jurisdiction" of the local board is merely a form of jurisdiction over the person of the registrant in the local board. Admittedly, a New York draft board could not order a registrant of a California local board (absent any requests to transfer) to report for induction into the Armed Forces because it has no personal jurisdiction over such a registrant. However, it would appear that this "geographical jurisdiction" is no different than if a local board ordered a registrant to report for induction the same day it classified him I-A (and thus denied him the right to appeal the classification); and in such a situation it is said that the local board lacked "jurisdiction" to order this registrant for induction at this time.

"Jurisdiction" as used in such a situation appears to mean the same as "geographical jurisdiction" as used by appellant.

In the *Estep* case, *supra*, the Supreme Court said "The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant."

This Court in the *Evans* case, *supra,* was apparently faced with a similar issue and it stated:

> "Appellant asserts that the local board lacked jurisdiction over him and, accordingly, his failure to exhaust his administrative remedies was excused. Appellant neglects to point out wherein the jurisdiction of the local board was even doubtful, much less lacking; but even if he had done so, his failure to appeal would bar his attack in the trial court on the local board's classification. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 82 L. Ed. 638, 58 S. Ct. 459; *Macauley v. Waterman S.S. Corp.,* 327 U. S. 540, 90 L. Ed. 839, 66 S. Ct. 712; *U. S. v. Sing Tuck*, 194 U. S. 161, 48 L. Ed. 917, 24 S. Ct. 621."

It appears then that if "geographical jurisdiction" is the same as the "jurisdiction" the courts referred to in the above two decisions; then appellant here cannot be heard to challenge the "jurisdiction" of Board 71.

Assuming that appellant can challenge Board 71's jurisdiction, upon whom rests the burden of proof? When appellant registered for the Selective Service System the registrar was Letha A. Starks, who was the registrar

for local boards 70 and 71. [Ex. 2.] It is conclusively shown that appellant was immediately placed in Board 71, and assigned a Selective Service Number 4-71-34-433 and this Selective Service No. indicates that appellant is a registrant in the State of California, at local board 71, was born in the year 1934, and is the 433rd man to meet the above three statistics. [Ex. 1, 2.] (32 C. F. R. 1621.2-1621.4.) The reverse side of a Registration Card has a rectangular box at the bottom below which is printed: "(Stamp of the Local Board of Jurisdiction as determined by item 2, front of card)." On the appellant's Registration Card [Ex. 2] in this box, appears the stamp of "Local Board No. 71." This factor plus the presumption of official regularity (about which we shall say more below) establishes in this case and in every Selective Service case a *prima facie* showing that the Local Board whose stamp appears on the Registration Card is the board that has jurisdiction over the owner of said Registration Card. Once this is established the burden of proving that the local board lacked jurisdiction of any kind rests upon the party that claims the board is without such jurisdiction. It is submitted then that the burden of proving the lack of jurisdiction of the Board 71 over appellant herein rests firmly on appellant; and there is no evidence that Board 71 lacked jurisdiction.

Appellant's argument appears to be as follows: (1) it is an essential element of the crime charged in this indictment to prove that Board 71 had jurisdiction over appellant [Tr. 14]; (2) the appellee attempted to prove this

element and failed because of errors in law made by the trial judge; (3) thus appellee failed to prove an essential element of the case.

Appellee opposes this argument on the following grounds:

(1) it is not an essential element of the prosecution to prove that the ordering local board lacked jurisdiction;

(2) the burden of proving a lack of jurisdiction rests with the appellant from the outset;

(3) the appellee established a *prima facie* showing that Board 71 had jurisdiction over appellant when Exhibit 1 (Appellant's Selective Service File) was duly received in evidence; and at this time the burden of proof was shifted to appellant to prove lack of jurisdiction of Board 71 over appellant, and this burden was not sustained by appellant.

(4) the physical evidence offered by appellee at the trial was properly admitted and conclusively shows that appellant's home address at the time he registered for Selective Service was within the geographical boundaries of Board's 71's territory; thus Board 71 has jurisdiction over appellant.

The first two grounds of appellee's opposition were discussed preliminarily.

The only evidence appellant introduced at the trial relevant to this issue is the testimony of Jay D. Hathaway, coordinator for the Fourth District, Selective Service System of the State of California, that there are four local boards in Fresno County, namely: 68, 69, 70, and 71.

[Tr. 11-12.] If the Court agrees with appellee that the appellant has the burden of proving lack of jurisdiction in Board 71 over appellant; then we need go no further as evidence that there are four boards in Fresno does not prove that Board 71 does not have the requisite jurisdiction.

At the trial, appellant asked the court to take judicial notice of the boundary lines of Board 71, and the court stated:

> "Well, the matter of judicial knowledge, of course, is a rather wide subject. Offhand, I don't know whether this Court can take judicial knowledge of the boundaries of the local draft boards, of their areas". [Tr. 13.]

The Court never did take judicial notice of the boundary line of Board 71; instead appellee introduced into evidence a legal description of Board 71's geographic boundaries, a large map showing the territory of all four Fresno boards, and a small map showing the boundary lines of Board 71. These three exhibits were received in evidence over appellant's objection. [Tr. 35.] Appellant claims it was error to admit these exhibits, but his claim is based on the mere assertion that there was no foundation. There is no attempt by appellant to show wherein the foundation was lacking. Appellee submits that there was a sufficient foundation laid for the admissions into evidence of these three exhibits. [Tr. 13-35.] Inasmuch as appellant does not state in detail the lack of foundation, appellee shall only briefly point out the foundation.

The foundation for Exhibit 2 in evidence was laid by Mr. Jay D. Hathaway [Tr. 15-19] and Mrs. Effie M. Ford. [Tr. 22-25.]

The foundation for Exhibits 3 and 4 in evidence was laid by Mr. Hathaway [Tr. 17, 18] and Mrs. Ford. [Tr. 25-34.]

There is one final point that is pertinent here. 32 C. F. R. 1604.54 provides:

> "Jurisdiction.—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law."

32 C. F. R. 1613.12 provides in part:

> "(a) The register shall take extreme care that the place of residence of the registrant is correctly entered on line 2 of the Registration Card. The local board having jurisdiction over the place of residence entered on line 2 of the Registration Card shall always have jurisdiction over the registrant, unless otherwise directed by the Director of Selective Service. The registrar shall require the registrant to give sufficient information as to the location of the place of his residence to establish such place within the jurisdiction of a local board."

32 C. F. R. 1613.42 provides:

> "Checking Place of Residence.—When a Registration Card is received or completed at the office of a local board, the local board shall carefully check the place of residence of the registrant as indicated

on line 2 of his Registration Card to determine whether or not the place of residence is within the area of the local board. The local board shall retain those cards indicating a place of residence within the area of the local board, and dispose of other cards as provided in section 1613.43."

32 C. F. R. 1613.43 provides in part:

"(a) If the local board finds that the place of residence of the registrant as shown on line 2 of his Registration Card is not within its area but is within its State it shall immediately mail the Registration Card of such registrant to the local board having jurisdiction of the place of residence if it is absolutely sure which local board has jurisdiction. If the local board has any doubt as to which other local board has jurisdiction or if the place of residence is not within its State, it shall mail such card to the State Director of Selective Service."

A presumption of regularity attaches to official proceedings and acts of Selective Service Boards, and appellant admits this, while claiming the presumption was rebutted by evidence that there are four boards in Fresno. (App. Br. p. 23.) Applying the presumption of regularity to the instant case in light of the above quoted Selective Service Regulations, the only conclusion that can be drawn is that appellant's address at the time he registered for the draft was within the territorial jurisdiction of Board 71. The fact that there are four local boards in Fresno, does not rebut this presumption.

VI.
CONCLUSION.

1. Appellant did not exhaust his administrative remedies.

2. Appellant was not entitled to judicial review of his classification.

3. There is a basis in fact for appellant's classification.

4. The jurisdiction of Board 71 over appellant was established.

5. There were no errors in law in the trial court.

6. The verdict of the trial court should be affirmed.

Respectfully submitted,

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No. 15,911.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

BILL WILLIAM PROHOROFF,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

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No. 15,911.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT.

BILL WILLIAM PROHOROFF,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING.

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on October 9, 1958, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion is incorrect.

I.

Appellant invites the attention of the Court to the following situation created by the opinion:

A. The opinion agrees in principle with appellant's position that valid evidence was required to show jurisdiction in the local board and agrees in principle with the query Judge Bowen directed to appellee: On what do you rely for the authentication of the maps? And the opinion obviously disagrees with appellee's answer, namely, We do not believe it was necessary for us to have offered any evidence whatsoever on this subject matter.

B. Then the opinion goes on to hold that appellant's failure to exhaust his administrative remedies barred him from raising this point.

Appellant respectfully urges that the above are not consistent. If, as he urged in argument, and as the Court impliedly holds, it is essential to a draft prosecution that there be valid proof in the record of the board's jurisdiction over its registrant (concededly it can be either by the presumption of regularity when applicable, or, as determined here, by sufficiently authenticated documents) we have been dealing with the problem of the prosecution's burden; we have not been dealing with the problem of availability of defenses. Appellant believes that he was barred only from "classification processing" defenses. Surely the Court does not intend that a so-situated defendant, one who has not exhausted his administrative remedies, cannot defend at all. Surely such a defendant can rely on the availability of defenses such as failure to show essential elements of the crime charged, including jurisdiction, wilfulness, faulty induction ceremony, etc.

II.

Appellant finally urges that the Court should not have concluded (1) that the documents were "authenticated" just because they were acted upon as genuine, nor (2) should the Court have approved the trial judge's findings that Prohoroff was within the jurisdiction of the local board because the trial judge found "an examination of the documents (so) reveals".

Appellant argues, with respect to (1) that the Court has overlooked *Johnston* v. *Jones et al.*, 66 U. S. 209, 225: maps are not independent evidence, and should be received only so far as shown to be correct by other testimony in the case; and with respect to (2) that this Court nowhere indicates how it found the "record amply justifies the District Court's findings" on this point. Was it judicial notice? Was it that one of the maps has street addresses printed thereon? As orally argued, neither such basis is a good one.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Appellant's Brief, it is respectfully urged that a rehearing be granted in this matter, and that the mandate of this Court be stayed pending the disposition of this petition.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. Tietz,

Attorney for Appellant.

No. 15912

In the United States Court of Appeals for the Ninth Circuit

CONTINENTAL TRADING, INC., PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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On Petition for Review of the Decision of the Tax Court of the United States

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The memorandum findings of fact and opinion of the Tax Court (R. 43-55) are not reported.

JURISDICTION

The petition for review (R. 86-88) involves income tax deficiencies for the calendar years 1948, 1949, and 1950.[1] A notice of deficiency covering all of the

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[1] Amounts involved are as follows (R. 43):

Year	*Deficiency*
1948	$208,300.59
1949	151,559.71
1950	114,468.53
	$474,328.83

taxes involved was mailed to the taxpayer to an address outside of the United States, on June 28, 1954. (R. 14-18.) On November 4, 1954, the taxpayer filed a petition in the Tax Court for redetermination of the deficiencies, pursuant to provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 6-15.) The decision of the Tax Court was entered on September 4, 1957. (R. 56.) The case is brought to this Court by petition for review filed by the taxpayer on December 3, 1957. (R. 86-88.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that during the taxable years the taxpayer was not engaged in trade or business within the United States within the meaning of Section 231(b) of the Internal Revenue Code of 1939, so as to qualify as a resident foreign corporation for tax purposes.

2. Whether the Tax Court correctly denied the taxpayer's motion for leave to file a motion to vacate its decision and to reopen the proceeding for the purpose of taking further testimony.

STATUTE AND REGULATIONS INVOLVED

The applicable provisions of the statute and Regulations will be found in the Appendix, *infra.*

STATEMENT

The facts, as stipulated by the parties (R. 20-42), and as found by the Tax Court (R. 44-51), are as follows:

Continental Trading, Inc., a Panamanian corporation organized in May, 1947, hereafter referred to as the taxpayer, maintained its principal office in Mexico City, Mexico. It filed its federal income tax return for 1948 with the Collector of Internal Revenue for the First District of California, and its 1949 and 1950 returns with the Collector of Internal Revenue for the District of Nevada. Those returns stated that the taxpayer was a resident foreign corporation with "Investment" as its principal activity. (R. 44.)

The taxpayer qualified as a foreign corporation in Nevada in March, 1948, and continued to be so qualified until March, 1951. It used for its American address that of a Reno, Nevada, company that acted as resident agent for the taxpayer and other foreign corporations. It represented that it maintained only one place of business in the United States. (R. 44.)

Grover Turnbow, a United States citizen with offices in Oakland, California, served as the taxpayer's president. After March, 1948, at the suggestion of the California attorney who served as the taxpayer's vice president, Turnbow had the taxpayer's name added to the business names already appearing on his Oakland office door and on the building directory. The names were: International Dairy Association, Inc., International Dairy Engineering Co., and International Dairy Supply Company, hereafter referred to as Association, Engineering, and Supply, respectively. Turnbow was president and sole stockholder of Supply. The taxpayer never used the Oakland address on its letterheads or otherwise, and paid no rent for the Oakland office. (R. 44-45.)

The taxpayer represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000. Wenner-Gren held substantial amounts of stock in the Electrolux and Servel Corporations, as well as sizable and diverse holdings in Mexican and other foreign enterprises. Prior to the taxpayer's incorporation, Turnbow served as attorney in fact in the United States for Wenner-Gren, who was then borrowing large sums from American lending institutions for use outside the United States. (R. 45.)

Turnbow became acquainted with Wenner-Gren in Mexico when he erected a recombined milk plant in which Wenner-Gren had a financial interest. Turnbow unsuccessfully sought to interest Wenner-Gren in financing the supplying of milk by Supply to the armed forces in the Far East. (R. 45.)

Turnbow and his various enterprises were interested in erecting recombined milk plants in foreign countries. Prior to and during the years here involved, the program failed to materialize because of the inability to reconvert foreign currency into American dollars, and because of the instability of foreign currencies. (R. 45.)

Turnbow hoped that the taxpayer would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to secure funds, but without any voice or activity in the operations of the plants. The taxpayer never undertook any activity in connection with the establishment

of such recombined milk plants, and never used its assets and borrowings for this or any related purpose. (R. 45-46.)

After the taxpayer's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired his stock in the Electrolux and Servel Corporations, which it thereupon pledged as security for loans. As of the beginning of 1948, the taxpayer had assumed indebtednesses of Wenner-Gren as follows (R. 46):

> Bank of America, N. T. & S. A., $1,100,000;
> Central Hanover Bank and Trust Company, New York, $480,000;
> Teleric, Inc., $926,000.

The taxpayer liquidated the loan from Central Hanover Bank during 1948. The loan from Teleric, Inc., remained outstanding as of the end of 1950. It liquidated the loan from Bank of America in August, 1948. (R. 46.)

From 1948 through 1950, the taxpayer had no paid employees in the United States. Turnbow received $1,500 per month during the last 6 months of 1950, denominated as salary for his services to the taxpayer. This represented part of an over-all settlement effectuated in June, 1950, between Turnbow and Wenner-Gren, as individuals, whereby Turnbow would receive from Wenner-Gren stock and cash totaling $105,000. The settlement covered, among other items, Turnbow's services to Wenner-Gren from October, 1946, through June, 1950. (R. 46-47.)

The taxpayer maintained no books of account in the United States. Its only records consisted of bank

statements, check books, and documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland. It maintained bank accounts in the United States at the First National Bank, Reno, Nevada, and at the Bank of America, N. T. & S. A. in San Francisco. (R. 47.)

The taxpayer's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances. (R. 47.)

The taxpayer reported on its tax returns for the years in question that it derived more than 50 per cent of its gross income from sources outside the United States. It reported gross income from sources within the United States, as follows (R. 47):

1948	$817,791.39
1949	605,635.10
1950	446,863.19

Of the 1948 gross income, $823,635.50 represented dividends on Electrolux and Servel stock. The difference was represented by a reported net loss of $5,-844.11, resulting from sales of property other than capital assets. Of the 1949 gross income, $602,125.20 represented dividends, and $3,509.90 represented "Other Income in the United States." Of the 1950 gross income, $441,624 represented dividends from the Electrolux Corporation, and $5,239.19 represented additional income "From Sales." (R. 47.)

During 1948, the taxpayer's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments of principal and interest on outstanding loans. (c) In May, it borrowed $1,000,000 from the

Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies. (d) On August 6, it borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the bank, which the taxpayer had assumed. On that same date the taxpayer drew checks in excess of the balance $750,000 to make payments of principal and interest on other outstanding indebtedness. (R. 48.)

During 1949, the taxpayer's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments on principal and interest on outstanding loans. (c) It secured and repaid short-term advances from Turnbow. (d) In September, it borrowed $1,700,000 from the Bank of America, used to liquidate the outstanding balances of two loans from that bank. (e) In December, it sold its 55,000 shares of Servel stock, theretofore pledged with the Bank of America to secure loans. It used the proceeds of the sale to pay outstanding obligations to the bank. (R. 48.)

During 1950, the taxpayer's activities in the United States included the following: (a) It collected dividends on Electrolux stock. (b) It made payments on principal and interest on outstanding loans. (c) On January 3, it borrowed $2,000,000 from the Central Hanover Bank. It used the bulk of this loan to repay the $1,700,000 loans from the Bank of America. It transferred approximately $400,000 to its account in Mexico City, $110,000 for the account of a Swedish bank, and approximately $275,000 to its account at the Bank of America, much of which was thereafter

transferred to the taxpayer's Mexican accounts. (d) It repaid the $2,000,000 loan. In its negotiations with the Central Hanover Bank, the taxpayer represented itself as a Panamanian corporation, doing business in foreign countries. (R. 48-49.)

The funds borrowed by the taxpayer were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use. (R. 49.)

In July 1948, the taxpayer engaged in a transaction of a type in which it was not previously nor subsequently engaged. It purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75. Through Association, a company in which Turnbow was interested, it resold the fat 1 month later to Kraft for $40,248. Association requested that Kraft made the check payable to the taxpayer. The taxpayer reported the loss in its 1948 tax return.

As an accommodation to a Mexican corporation, the taxpayer purchased, in 1950, equipment for that corporation for which it was reimbursed without profit. (R. 49.)

In each year, the only other activity reported by the taxpayer was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948, such reported income amounted to $120.64; in 1949, $3,509.90; in 1950, $5,239.19 (R. 49-50.)

In connection with its contract for supplying recombined milk products to troops in the Far East, Supply found it necessary, commencing in 1948, to obtain tin cans. The contracts set forth specifications for the necessary cans to be bought in the United

States. In 1948, Supply procured the cans from Western Can Company, hereafter referred to as Western. An employee in Supply's procurement department ordered the necessary number of cans by telephone, and followed up with a written purchase order. Supply received shipments for which it paid by check. (R. 50.)

In December, 1948, the taxpayer undertook to place with Western, in its own name, an order covering precisely the same type of cans and bearing the same markings as Supply had theretofore ordered in its own name from Western. Western billed the taxpayer at the same price which Supply had paid Western on an earlier order. That order, in the taxpayers' name, was first telephoned to Western by either Supply's procurement department or Turnbow's secretary, on December 8, 1948. The Western saleman who received the order filled out an order form in the name of Supply, but the taxpayer's name was added later. (R. 50.)

On the day that the order was telephoned to Western, Supply prepared an export purchase order for the cans, addressed to the taxpayer. Supply had used the same form in preparing its orders theretofore forwarded directly to Western. The taxpayer then forwarded to Western a written confirmatory order in its name. The taxpayer's check dated December 16, 1948, extinguished the obligation to Western for the cans. Supply paid an invoice on the taxpayer's letterhead for the cans at a 5 per cent increase in price within 10 days of the invoice date. (R. 50-51.)

In 1949, the taxpayer utilized the same recording and routing of orders for cans needed by Supply on 37 occasions. It derived the proceeds reported as income on its 1949 returns because it billed Supply at 5 per cent more than it was billed by Western. In 1950, it utilized the same recording and routing on approximately 48 occasions, and derived the reported profit from sales transactions from this operation. (R. 51.)

There was no business purpose connected with the can transactions engaged in by the taxpayer. It never used its Nevada office in these operations. It carried no inventory of cans, and ordered no cans other than those used by Supply. In every instance in which Supply acquired cans in this way, it paid the taxpayer within 10 days of the taxpayer's payment to Western. (R. 51.)

After 1950, Supply recommenced ordering and purchasing of cans directly from Western. (R. 51.)

The Tax Court found that during 1948, 1949, and 1950, the taxpayer was not engaged in trade or business within the United States. (R. 51.)

SUMMARY OF ARGUMENT

I. The Tax Court correctly held that taxpayer was not "engaged in trade or business within the United States", within the meaning of Section 231(b) of the 1939 Code. Taxpayer was organized primarily to finance the production of recombined milk plants. The Tax Court found that it did not engage in this activity during the taxable years. It earned no income from such activity. On the contrary, its re-

ported gross income for the taxable years was derived—to the extent of approximately 99%—from the collection of dividends from Servel and Electrolux, two domestic corporations whose stock had been transferred to it by Axel Wenner-Gren. Its activities, other than the collection of dividends, resulted, as the Tax Court found (R. 53-55), "in no substantial gain, and considering the time spent on them * * * could not, and in several instances actually did not, result in even a nominal net profit." They were marked by an "obvious lack of business purpose", and were "dictated not by a business objective but purely by a desire to save taxes". In addition, the transactions which taxpayer relied upon as constituting business activity in the statutory sense were considered by the Tax Court as "isolated activities", having "neither [the] consistency nor frequency * * * which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue".

II. The Tax Court correctly denied taxpayer's motion for leave to file the motion to vacate the decision, to reopen the proceeding, and to take further testimony. The motion was filed beyond the 30-day period after the decision had been entered, in contravention of Rule 19(e) and (f) of the Tax Court's Rules of Practice. Nor did taxpayer submit with the motion any information disclosing any possible ground for granting it, even if it had been timely made. In any event, the information which taxpayer orally represented as indicating that there was newly-

discovered evidence fell far short of the mark. At the most, taxpayer in effect merely alleged at the hearing on the motion that, at the trial, prior counsel had failed, and without good reason, to offer in evidence material that was then in existence. The Tax Court correctly viewed the motion proceedings as, in substance, an attempt by newly engaged counsel to retry the case.

ARGUMENT

I

The Tax Court Correctly Held That During the Taxable Years Taxpayer Was Not Engaged In Trade Or Business Within the United States, Within the Meaning of Section 231(b) of the Internal Revenue Code of 1939, and Consequently Did Not Qualify As A Resident Foreign Corporation for Tax Purposes

The primary issue in this case is whether, during the years in question, taxpayer, a Panamanian corporation, qualified as a resident foreign corporation by engaging "in trade or business within the United States" within the meaning of Section 231(b) of the Internal Revenue Code of 1939 (Appendix, *infra*). As taxpayer concedes (Br. 17-18), if it so qualified it could claim certain substantial tax advantages which would otherwise not be available to it as a non-resident foreign corporation. The Tax Court found that (R. 51) "During 1948, 1949 and 1950, petitioner was not engaged in trade or business within the United States". In reaching that conclusion, it applied to taxpayer's (R. 53-54) "detailed analysis * * * of all of its transactions during the years in controversy" certain tests which have been judicially ap-

plied in this area of the law, in the application of which it determined that, except for "items accounting for a fraction of 1 per cent of petitioner's total income", all of the remaining transactions could not "by any stretch of the imagination * * * be considered business", since (a) notwithstanding petitioner's categorical statement to the contrary, they were transactions with an "obvious lack of business purpose", and (b), viewed (R. 55) *"as a whole"*[2] * * * there was neither consistency nor frequency in those few isolated activities which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue".

A. *The applicable legal principles*

The question whether a corporation is engaged in business activity within the meaning of the federal tax statutes has received extensive judicial consideration in a variety of contexts. See 8 Mertens, Law of

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[2] The underscoring is supplied because taxpayer's argument in this Court is, in substantial part (Br. 20-51), mainly an attack on the Tax Court's alleged piecemeal and fragmentary approach to this case. We think, however, that the Tax Court's careful marshaling and evaluation of the evidence demonstrate that it did not "let the fagot be destroyed by taking up each item of conduct separately and breaking the stick", but in fact judged "The activities and situation [of taxpayer] as a whole." *Edwards* v. *Chile Copper Co.*, 270 U.S. 452, 455-456. Contrary to taxpayer's contention, it viewed "the composite picture of * * * [taxpayer's] activities and powers * * * as an integrated whole and a solution * * * [was] sought accordingly". *Helvering* v. *Scottish American Inv. Co.*, 139 F. 2d 419, 422 (C.A. 4th), affirmed, 323 U.S. 119.

Federal Income Taxation, Sections 45.20 and 45.25. In *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, involving the question whether a corporation was carrying on business within the meaning of the so-called Corporation Tax Act, the Supreme Court "adopted with approval the definition judicially approved in other cases, which included within the comprehensive term 'business that which occupies the time, attention and labor of men for the purpose of livelihood or profit' ". *Von Baumbach* v. *Sargent Land Co.*, 242 U.S. 503, 515. See also *Higgins* v. *Commissioner*, 312 U.S. 212, 217. In the *Sargent Land Co.* case, the Supreme Court held that a corporation was doing business if it was (pp. 156-157) "active and is maintaining its organization for the purpose of continued efforts in the pursuit of profit and gain in such activities as are essential to those purposes". And in *Edwards* v. *Chile Copper Co.*, 270 U.S. 452, in considering whether a corporation was subject to a tax on capital stock valuation (p. 453) "with respect to carrying on or doing business", the Supreme Court concluded that the corporation was within the taxing Act since (p. 455) "it was organized for profit and was doing what it was principally organized to do in order to realize profit". The Court further stated that the exemption " 'when not engaged in business' ordinarily would seem pretty nearly equivalent to when not pursing the ends for which the corporation was organized, in the cases where the end is profit".

In *Section Seven Corp.* v. *Anglim*, 136 F. 2d 155, 158, this Court held that a corporation was doing business within the meaning of the tax statute there

involved where, despite the paucity of its activities, it was nevertheless "organized for profit *and was doing what it was principally organized to do in order to realize a profit*". (Emphasis supplied.) See also *Ehrman* v. *Commissioner*, 120 F. 2d 607, 610 (C.A. 9th); *United States* v. *Peabody Co.*, 104 F. 2d 267, 269 (C.A. 6th); *Harmar Coal* v. *Heiner*, 34 F. 2d 725 (C.A. 3d), certiorari denied, 280 U.S. 610. Cf. *Goodyear Inv. Corp.* v. *Campbell*, 139 F.2d 188, 191 (C.A. 6th); *Zonne* v. *Minneapolis Syndicate*, 220 U.S. 187, 190, 191; *United States* v. *Emery*, 237 U.S. 28; *McCoach* v. *Minehill Railway Co.*, 228 U.S. 295.

The test to be applied in ascertaining whether a corporation is engaged in trade or business within the United States has been regarded as having both qualitative and quantitative aspects. *Scottish American Investment Co.* v. *Commisisoner*, 12 T.C. 49, 59; *Linen Thread Co.* v. *Commissioner*, 14 T.C. 725; *Lewellyn* v. *Pittsburgh, B. & L. E. R. Co.*, 222 Fed. 177 (C.A. 3d); 8 Mertens, Law of Federal Income Taxation, Section 45.25. However, the mere fact that a corporation enters into isolated transactions, or transactions which are unrelated either (1) to the purpose as announced in its charter or (2) to the general "pursuit of profit and gain" (*Von Baumbach* v. *Sargent Land Co.*, *supra*, p. 516), does not mean that it is "engaged in trade or business".

In the *Section Seven Corp.* case, *supra*, this Court agreed (p. 158) "with the other courts which have considered this problem that there is, perhaps, no precise formula whereby all cases * * * might readily

be resolved, *and that each case must be decided upon its own facts*". (Emphasis supplied.) In this connection, taxpayer in the instant case does not charge that the Tax Court failed to follow the applicable statute or Regulations; nor, on proper analysis, can it be charged that there was any clear-cut mistake of law in the application of Section 231 (b) of the 1939 Code, since, as we have already noted and as will be demonstrated below, the Tax Court did take into consideration and regard, as a whole, all of taxpayer's activities, and in the light of its declared business purpose. Accordingly, absent any showing that the Tax Court's findings and ultimate conclusion were clearly erroneous, the Supreme Court's admonition in *Commissioner* v. *Scottish American Co.*, 323 U.S. 119, concerning the appellate function *in this type of case* has some relevance (despite the subsequent abandonment of the so-called *Dobson* rule). In the *Scottish American Co.* case the question, as here, was whether the Tax Court, as a matter of law, had improperly classified certain entities as resident foreign corporations; the Court stated that the case (p. 125)—

> exemplies one type of factual dispute where judicial abstinence should be pronounced. The decision as to the facts in this case, like analogous ones that preceded it, is of little value as precedent. The factual pattern is too decisive and too varied from case to case to warrant a great expenditure of appellate court energy on unravelling conflicting factual inferences. The skilled judgment of the Tax Court, which is the basic fact-finding and inference-making body, should thus be given wide range in such proceedings.

B. *The facts*

Judged by the aforementioned criteria, the Tax Court correctly decided that taxpayer was not "engaged in trade or business within the United States" during the taxable years, within the meaning of Section 231 (b) of the 1939 Code. On the basis of the whole record before it, it in effect held that the transactions testified about were (R. 52) "of an isolated and noncontinuous nature"; were "not entered into for profit"; did not, and "in all probability" could not, "result in a profit", and that in fact (R 53) "only items accounting for a fraction of 1 per cent of petitioner's total income represent those which *by any stretch of imagination could be considered business*". (Emphasis supplied.)

True, the taxpayer reported gross income from sources within the United States, in the following amounts (R. 47): 1948—$817,791.39; 1949—$605,635.10; 1950—$446,863.19. But only a tiny fraction of those amounts, less than 1 per cent, reflected transactions which the Tax Court would place in the category of business activity. And even those transactions, in the Tax Court's view (R. 53), "resulted in no substantial gain, and considering the time spent on them * * * could not, and in several instances actually did not, result in even a nominal net profit."

The record substantiates this *composite* picture of taxpayer's activities. Taxpayer received substantial amounts of dividends from Servel and Electrolux: $823,635.50 in 1948;[3] $602,125.20 in 1949; $441,624

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[3] The difference between the total amount of the dividends received ($823,635.50) and the gross income reported

in 1950. If it qualified as a resident foreign corporation, i.e., if it was "engaged in trade or business within the United States" in the statutory sense, taxpayer would be entitled to substantial dividends received credits; but if it did not so qualify, it would not be entitled to the credits. Hence the practical importance to it of attempting to qualify as a "foreign corporation engaged in trade or business within the United States"—an attempt which the Tax Court considered was apparently admittedly (R. 54) "dictated not by a business objective but purely by a desire to save taxes." In the instant case, the fact that taxpayer's receipt of dividends from the Electrolux and Servel corporations represented approximately 99 per cent of its gross income surely warranted inquiry whether taxpayer fell—as the Tax Court in effect concluded it did—within that category (H. Rep. 2333, 77th Cong., 1st Sess., p. 103 (1942-2 Cum. Bull. 372, 449-450)) "of foreign corporations which are substantial holders of the stock of domestic corporations" and which *purportedly* engage in "other economic activities in the United States"—in order to "secure the very different tax treatment accorded taxpayers" who are "subject to tax at the corporate rate applicable to domestic corporations." As the Tax Court correctly observed, Congress, in enacting the 1942 amendment to the statutory provision here

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($817,791.39), or $5,844.11, reflected a reported net loss resulting from sales of property other than capital assets. In 1949, only $3,509.90 of taxpayer's reported gross income represented "Other income in the United States." In 1950, in addition to the dividends received, it reported only $5,-239.19 as income "From Sales." (R. 47.)

involved, left (R. 53) "little room for doubt * * * that a foreign corporation merely *servicing its investments in this country* was *not* the type of taxpayer to which * * * section [231 (b)] was intended to refer." (Emphasis supplied.) If the Tax Court's view of taxpayer's activities (other than the collection of dividends) is correct, they amounted to little more than a tax-saving-motivated attempt to qualify the collection of dividends as business activity within the special meaning of the statute.

But from a realistic point of view, other than collecting the substantial amount of dividends in the taxable years, taxpayer did little, if anything, that was designed "to realize a profit" in connection with "what it was principally organized to do." *Section Seven Corp.* v. *Anglim, supra*, p. 158. This does not mean, of course, that the other transactions entered into were not in fact what they appeared to be in form; taxpayer confuses the issue by suggesting that the Tax Court considered otherwise. It does mean, however, that the fact that certain transactions were entered into is not *alone* conclusive of the issue, but leaves open the question whether, considering all the circumstances, all of the transactions entered into constituted doing business in the United States in the statutory sense. As the Tax Court succinctly noted (R. 54-55), "we may regard the transactions as 'substantive' in the sense that the operations described were actually performed, just as they were so regarded in * * * *Gregory* [v. *Helvering*, 293 U.S. 465] * * * without concluding that they constituted the conduct of a business, that they rendered the pe-

titioner 'busy' or that they were engaged in for a livelihood or profit." [*Flint* v. *Stone Tracy Co.*, *supra*]; *Spermacet Whaling & Shipping Co.* v. *Commissioner*, decided June 13, 1958 (1958 P-H T.C. Memorandum Decisions, par. 30.57).

Apart from the holdings of the shares of stock of Electrolux and Servel, and the collection of dividends thereon, the Tax Court found that taxpayer indulged in activities which—having in mind the purpose for which taxpayer was organized—were deemed to have had no (R. 54, 55) "business objective", and in addition, no such "consistency" or "frequency * * * which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue." As the Tax Court understood Turnbow's testimony, Turnbow became interested in erecting recombined milk plants in foreign countries after he had become acquainted with Wenner-Gren in Mexico when he (Turnbow) erected a recombined milk plant in which Wenner-Gren had a financial interest. According to Turnbow, it was hoped (R. 45-46):

> that petitioner would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to secure funds, but without any voice or activity in the operations of the plants.[4]

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[4] Turnbow's verbatim testimony as to the reason for taxpayer's organization was as follows (R. 203):

> Continental Trading—I have nothing to do with Con-

taxpayer itself described its activity as "Investment." (R. 55.) The fact is, however, as the Tax Court found, that taxpayer (R. 46) "never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and

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tinental Trading except I got these people that owned it—I sold them on an idea, at least I thought I had, to be the financial house to make it to get the money to build these—to carry the finances in to do these dairy jobs in foreign countries. They had nothing to do with the operations of milk plants, they had nothing to do, but were simply a financial house only. They had money and—some money, and I tried to make that available for the purpose of financing these various dairy companies.

Taxpayer's brief (p. 34) concedes that "In the case at bar, * * * petitioner's intention was clearly to make money on dividends while developing in the United States a program for investment as a participant in the production of recombined milk * * *." (The remaining portion of the statement, relating to the alleged prospective sales of cans, is dealt with at another point in this brief.)

The stipulation sets forth the purposes for which taxpayer was organized, as follows (R. 21-22):

> To manufacture, produce and process and to buy, sell, distribute, consign and otherwise dispose of and deal in, at wholesale and at retail, all kinds of milk and milk products; to manufacture, buy, produce and process, and to buy, sell, distribute, consign and otherwise dispose of, at wholesale and at retail, all kinds of food and food products, to raise, buy, sell, distribute and deal in, all kinds of garden, farm and dairy products; to raise, buy, sell and otherwise deal in and dispose of cattle and all other kinds of livestock; to manufacture, lease, buy, sell, deal in, consign and otherwise dispose of machinery, tools, implements, apparatus, equipment, and any and all other materials, supplies, articles and appliances used in connection with all or any of the purposes aforesaid, or in connection with the sale,

borrowings for this or any related purpose." The program failed to materialize because of the inability to reconvert foreign currency into American dollars, and because of the instability of foreign currencies. (R. 45.)

Nor were any of taxpayer's activities (the collection of dividends aside) related in any substantial way to the making of profit, or to any of the purposes for which taxpayer was mainly created. True, during the taxable years taxpayer made payments of principal and interest on outstanding loans; it also borrowed substantial amounts. But they were payments on account of the liabilities of Wenner-Gren which taxpayer had assumed upon transfer to it of the Servel and Electrolux stock. As to the loans, the Tax Court found that the $1,000,000 borrowed in 1948 from the Bank of America was used by Wenner-Gren to acquire Mexican telephone companies; that $1,100,000 of the $1,850,000 borrowed in 1948 from

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transportation or distribution of any or all goods, wares, merchandise or other personal property dealt in or disposed of or handled by the corporation.

To subscribe for, or cause to be subscribed for, buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, acceptances, drafts and evidences of indebtedness issued or created by other corporations, joint stock companies or associations, whether public, private or municipal, or any corporate body, and while the owner thereof to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including any rights to vote thereon.

the Bank of America was used to repay the prior indebtedness of Wenner-Gren to that bank, the remaining $750,000 being used to make payments of principal and interest on other outstanding indebtedness; that the $1,700,000 borrowed from the Bank of America in 1949 was used to liquidate the outstanding balances of two loans from the bank; that the bulk of $2,000,000 borrowed from the Central Hanover Bank was used to repay the aforementioned loan of $1,700,000 from the Bank of America. The Tax Court found that not only did taxpayer never undertake (R. 46) "any activity in connection with the establishment of * * * [any] recombined milk plants" but "*never used its assets and borrowings for this or any related purpose*"; further, that the (R. 49) "funds borrowed by petitioner were in the main used by Wenner-Gren", and that "Turnbow [taxpayer's president] had no direct knowledge of their use." (Emphasis supplied.) Turnbow, asked whether he knew what use had been made of the borrowed funds, replied (R. 215):

> Only indirectly to some extent. I know that they were used by Axel.

There are three additional categories of transactions upon which taxpayer rests its claim of doing business within the United States during the taxable years:

(1) In July 1948, taxpayer purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75, resold the fat one month later to Kraft Company for $40,248, and reported a loss on the transac-

tion in its 1948 return. Any intimation that that transaction, considered either alone or in connection with all the other transactions, constituted doing business within the meaning of the statute disappears upon examination of the evidence. Turnbow testified on cross-examination that taxpayer could *not* have used the fat in making recombined milk, because (R. 252) "at the time of that transaction * * * the recombined plants weren't in operation". In any event, as the Tax Court understood the testimony with respect to this item, the transaction was (R. 49) "of a type in which * * * [taxpayer] was not previously nor subsequently engaged". It was truly an isolated transaction, in which, as taxpayer concedes (Br. 31), it suffered a loss of some $6,000.

(2) In 1950, taxpayer purchased, *as an accommodation to a Mexican corporation*, equipment for that corporation for which it was reimbursed without profit. The Tax Court was obviously justified in refusing to attach any signficance to that transaction, since it apparently had no relationship to the purposes for which taxpayer was organized.

(3) In 1948, 1949 and 1950, the only other activity which taxpayer reported was represented by nominal amounts of income resulting from transactions relating to cans used by the International Dairy Supply Company, of which Turnbow was president and sole stockholder. These transactions, accounting for only $120.64 of reported income for 1948, $3,509.90 for 1949, and $5,239.19 for 1950, amounted to little more than an interposition, without any substantial business purpose, between International Dairy Supply

Company and Western Can Company. It was clear from the Tax Court's findings of fact as to this transaction (R. 50-51) that although the transactions were real in the sense that they actually occurred they were (R. 54-55) "dictated not by a business objective but purely by a desire to save taxes"; they were " 'substantive' in the sense that the operations described were actually performed", but they did not constitute "the conduct of a business", did not render taxpayer "busy", nor were they "engaged in for a livelihood or profit." Cf. *Gregory* v. *Helvering*, 293 U.S. 465; *Linen Thread Co., supra.* The record discloses that beginning in 1948 the International Dairy Supply Company (referred to as Supply) found it necessary to obtain tin cans in connection with its contract for supplying recombined milk products to troops in the Far East. The contract spelled out the specifications for the necessary cans to be bought in the United States. In 1948, Supply procured the cans from the Western Can Company (referred to as Western). An employee in Supply's procurement department telephonically ordered the cans, following up with a written purchase order. Supply received shipments for which it paid by check. In December of 1948, taxpayer undertook to place with Western, in its own name, an order covering precisely the same type of cans and bearing the same markings as Supply had theretofore ordered in its name from Western. Western billed taxpayer at the same price which Supply had paid Western on an earlier order. Taxpayer's order was first telephoned to Western either by Supply's procurement depart-

ment or by Turnbow's secretary. Western's salesman who received the order filled out an order form in the name of Supply; taxpayer's name was added later. On the day that the order was telephoned to Western, Supply prepared an export purchase order for the cans, addressed to taxpayer. Supply had used the same form in preparing its orders which theretofore had been directly forwarded to Western. Taxpayer then forwarded to Western a written confirmatory order in its name. Taxpayer's check of December, 1948, represented payment in full to Western. Supply paid an invoice on taxpayer's leterhead at a 5% increase in price. The same procedure with respect to the recording and routing of orders for cans was followed on 37 occasions in 1949, and on approximately 48 occasions in 1950. As in 1948, taxpayer billed Supply 5% more than it was billed by Western. Taxpayer never used its Nevada office in any of these can transactions; it carried no inventory of cans; it ordered no cans other than those used by Supply; and in every instance in which Supply acquired cans in this manner it paid taxpayer within 10 days of taxpayer's payment to Western. (R. 50-51.) Turnbow sought to explain (R. 207-208) "why international Dairy Supply, after it had engaged in the operation of acquiring cans directly from Western Can Company, then sought to introduce Continental Trading into the picture." The explanation [5] does not ap-

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[5] Turnbow stated (R. 207-208):

> Why, I thought it was a free country, private free enterprise, and I don't think there is any law that tells me to buy from you or you or you. There is nothing

pear convincing, and would seem to lend support to the Tax Court's conclusion that the can transactions had no substantial business purpose, but were entered into in order to qualify taxpayer, formalistically, as a resident foreign corporation; i.e., they were motivated (R. 54) "purely by a desire to save taxes."

II

The Tax Court Correctly Denied Taxpayer's Motion for Leave To File A Motion To Vacate the Decision, To Reopen the Proceeding, and To Take Further Testimony

The Tax Court entered its decision on September 6, 1957, and served it upon the parties on the same day. (R. 56.) Rule 19 (e) and (f) of the Rules of Practice of the Tax Court (Rev. January 15, 1957) provides as follows:

> RULE 19. MOTIONS.
>
> * * * *
>
> (e) No motion for retrial, further trial, or reconsideration may be filed more than 30 days after the opinion has been served, except by special leave.

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about that, so undoubtedly it was a good business decision, in which I probably made the decision, with their approval, to buy the cans. I am sure they would take the approval because I think they got five per cent *market*, which is a very small amount of money. We tied their money up, see.

The fact is, however, that taxpayer's money was not tied up, for within ten days or less after taxpayer sent its checks to Western, it received checks in like amount plus about five per cent from Supply.

> (f) No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

The taxpayer's motion for leave to file a motion to vacate the Tax Court's decision, to reopen the proceeding, and to take further testimony was not filed until November 19, 1957 (R. 79-80), more than 30 days after the opinion had been served and the decision entered. The Tax Court, in effect refusing to grant *special* leave to file the motion, denied it. (R. 80.)

Aside from the admitted facts that (1) the motion was untimely, and (2) in the circumstances, the granting of the motion was a matter for the exercise of the Tax Court's discretion,[6] it is clear that, except for a mere conclusory statement that new evidence had been discovered, the taxpayer failed to submit with its motion for leave to file a motion any information which might have afforded a possible ground for the granting of the motion, even if it had been timely made. At the hearing on the motion, taxpayer's counsel, admitting that (R. 265) "The motion as it is * * * [is based on] newly-discovered evidence", requested permission to indicate orally "rather briefly and quickly some of these items of newly-dis-

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[6] Taxpayer's present counsel stated to the Tax Court (R. 258):

> We recognize that right at the outset the 30-day period provided by this Court's rules for filing motions for reconsideration has run. Therefore, I take it, this is purely and simply a discretionary matter with this Court, as to whether or not they will permit us to file our motion.

covered evidence we are talking about, and perhaps put this thing in focus". Asked by the court: "Do they appear in the motion papers?", counsel replied: "No, they do not". Counsel further stated that because he had realized (R. 266):

> * * * the potential defectiveness of my position, in the sense I couldn't spell out * * * [in the motion] the facts I am talking about, I asked * * * two gentlemen to be here available today, so you wouldn't have to take my word for it, so if you cared to you could hear their sworn testimony. And I would suggest it would come under the broad language I attempted to use, namely, that there is newly-discovered evidence.

The Government, objecting to any further delay (R. 268), took "the position that the motion *on its face* is what we are arguing today". (Emphasis supplied.) The Tax Court said (R. 270):

> The government said to you as I understand it, you get the motion up, we will hear it and consent to short notice. Now, you are coming in and saying the motion wasn't completed in time, in effect it seems to me that is what you are saying. A motion is supposed to be supported by some kind of adequate material to justify the granting of the motion on the facts shown, at least the prima facie showing. I don't say that the affidavits would necessarily * * * be final proof of what was in them, but at least there would be something in the record. *Now, there is nothing in the record.* (Emphasis supplied.)

In the court's view, to have granted the motion for leave to file a motion would not only (R. 266) "in

effect be encouraging dilatory proceedings", it would also mean that if the motion was granted on the basis of what had been submitted therewith (and not on the basis of the proferred statement of counsel or witnesses) the court would "have [had] to take things for granted that are presumably an essential part of the considerations on the basis of which any motion like this could be granted"; further, to grant the motion for leave to file a motion on the basis of material not submitted with it, in order, ultimately, to have a further hearing in the matter, would in effect be (R. 267) "to have the further hearing" then and there. We submit that in the circumstances the Tax Court's denial of the motion was entirely justified, and involved no abuse of its discretion.

Even if it is assumed, *arguendo*, that the motion for leave to file a motion should have been granted, there is nevertheless grave doubt whether the taxpayer's proffer as to the alleged newly-discovered evidence (R. 271-280) showed any substantial basis for vacating the decision and reopening the case. Taxpayer's counsel stated that at the trial of the case below Mr. Turnbow, the taxpayer's president, had failed to disclose certain matters, some of which (R. 271) "conceivably are matters about which he knew nothing". Admittedly, "some of them * * * [were] matters of which * * * [Turnbow] personally had knowledge and conducted various negotiations". However, analysis of counsel's complete statement on this subject (R. 271-280) fails to disclose that there were any matters which would qualify as "newly-discovered" in any meaningful sense as of the words.

Taxpayer's counsel in effect admitted as much. (R. 274.) Replying to the court's suggestion that the alleged newly-discovered evidence was in fact in existence at the time of the trial of the case, was known to the taxpayer's officers, and could have been put in evidence at the hearing, counsel said that that was (R. 275) "Perhaps * * * a fair statement", even though adding "although certainly it depends on how you interpret 'newly-discovered'." Moreover, the Tax Court pointed out, the alleged newly-discovered evidence seemed to have been not (R. 275) "really newly-discovered by anybody but" counsel himself, and not by the taxpayer or any of its officials (R. 274) "or even by the prior lawyer". The implication of this observation was that, even though present counsel may have correctly ascertained that prior counsel should have proffered certain material at the trial, that was no warrant for characterizing the material as newly discovered; nor was it a sufficient basis for extending the time limit for vacating the decision in order to reopen the case for further proceedings. As the Tax Court observed (R. 280):

> There is a clear implication in the rules, at least, that the engaging of new counsel is not a reason for doing away with a time limit which otherwise appears in the rule. That is the result of a combination of rules 19, 20 and 27.[7]

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[7] The pertinent provisions of Rule 19 are as follows:

RULE 19. MOTIONS

* * * *

(e) No motion for retrial, further trial, or recon-

The Tax Court also warned that if, in the circumstances of this case, a motion for leave to file a motion was granted simply because new counsel considered that evidence should have been presented at the trial which was not presented, but which was available (R. 280)—

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sideration may be filed more than 30 days after the opinion has been served, except by special leave.

(f) No motion to vacate or revise a decision may be filed more than 30 days after the decision has been entered, except by special leave.

Motions covered by (e) and (f) shall be separate from each other and not joined to or made a part of any other motion.

Rule 20 of the Tax Court provides, among other things, as follows:

RULE 20. EXTENSIONS OF TIME

(a) An extension of time * * * may be granted by the Court within its discretion upon a timely motion filed in accordance with these Rules setting forth *good and sufficient cause* therefor or may be ordered by the Court upon its own motion. (Emphasis supplied.)

Rule 27 provides, among other things, as follows:

RULE 27. PLACE, TIME, AND NOTICE OF HEARINGS AND TRIALS—ATTENDANCE AND CONTINUANCES

* * * *

(c) *Continuances—Motions—Trials.*—

(1) Court actions on cases set for hearing on motions or trial will not be delayed by a motion for continuance unless it is timely, sets forth *good and sufficient cause,* and complies with all applicable Rules. (Emphasis supplied.)

(2) Conflicting engagements of counsel *or the employment of new counsel* will never be regarded as good ground for a continuance unless set forth in a

> it would, for no reason other than the substitution of new counsel * * * make it possible for the cases in Tax Court to be indefinitely prolonged, to be reopened, or innumerable motions to be made, first on one ground, and then on another * * *.

Taxpayer's contentions with respect to this issue (Br. 56-63) are not convincing. (1) While it is true that Axel Wenner-Gren had not been called as a witness at the trial, it was not demonstrated below that he was (a) unavailable, or (b) would have appeared as a witness. At the hearing on the motion taxpayer's counsel stated that (R. 263) "Mr. Axel L. Wenner-Gren, himself, would be willing to testify in a proceeding relating to this company, and in fact would have testified at the prior hearing had he been requested to"; the Tax Court, however, was quick to point out that it could find no "statement in Mr. Wenner-Gren's affidavit, that he *would have appeared*" at the hearing, if called; and similarly, there was "no

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> motion filed promptly after the notice of hearing or trial has been mailed or unless extenuating circumstances are shown which the court deems adequate. (See Rule 20.) (Emphasis supplied.)

The Tax Court also stated an additional reason why it could not (R. 280)—

> even get beyond the motion for leave [since the] motion that is proposed to be made doesn't accord with the Rules of the Tax Court; particularly Rule 19, which provides that motion for further trial, and so on, shall not be combined with a motion to vacate a decision.

The motion to vacate the decision below in this case was combined with the motion to ~~state~~ take further testimony. (R. 81-82.)

statement under oath that * * * he *would appear* in a new proceeding." (Emphasis supplied.) (2) Even if it is true that (Br. 60) "an incomplete presentation of facts was made to the Tax Court [by prior counsel], and * * * moreover, some of the facts were inadequately if not inaccurately presented", surely ineptness of presentation by prior counsel, unfortunate though it may be to the taxpayer, affords no basis for a new trial. Any contrary rule would obviously frustrate the established policy against multiplicity of trials, as well as "the established policy against piecemeal review" of cases. *United States* v. *Fauci*, 242 F. 2d 237, 238 (C.A. 1st). (3) And these same considerations would militate against the granting of a new trial on the ground—asserted by taxpayer at the argument on the motion, and now only intimated (Br. 61)—that the case had been tried by prior counsel on a (R. 261) "misconception of what the real legal issue was in this case". The two cases (Br. 61-62) cited to support the contention that a new trial should be granted on such a dubious ground are clearly inapposite, even if it is assumed, *arguendo* (as taxpayer urges) that the criteria laid down in Rule 60 of the Federal Rules of Civil Procedure are, as a matter of law, binding on the Tax Court. But see *Katz* v. *Commissioner*, 188 F. 2nd 957, 959 (C.A. 2nd). The simple fact is that if it is true, as taxpayer now states, that the court below reached its conclusion (Br. 63) "upon incomplete and partially inaccurate facts", taxpayer has only itself to blame for failing to present, completely and accurately, *all* of the facts which were available to it at the hearing on the merits, none of

which, by any proper definition, constituted "newly-discovered" evidence at the time of the hearing on the motion.[8]

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted,

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JULY, 1958.

[8] As taxpayer concedes (Br. 64), there is no issue before this Court respecting the deductibility of alleged items of interest, expenses, and losses on sale of property.

APPENDIX

Internal Revenue Code of 1939:

> SEC. 231 [As amended by Sec. 104 (d), Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 160, Revenue Act of 1942, c. 619, 56 Stat. 798]. TAX ON FOREIGN CORPORATIONS.
>
> * * * *
>
> (b) *Resident Corporations.*—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in Section 14 (c) (1) and Section 15.
>
> * * * *
>
> (26 U.S.C. 1952 ed., Sec. 231.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

> SEC. 29.231-1. *Taxation of Foreign Corporation.*— * * *
>
> * * * *
>
> (b) *Resident Foreign Corporations.* * * *
>
> * * * *
>
> As used in Sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year. * * *
>
> * * * *
>
> SEC. 29.231-2. *Gross Income of Foreign Corporations.*— * * *
>
> * * * *
>
> (b) *Resident Foreign Corporations.*— * * *
> A foreign corporation which effects transac-

tions in the United States in stocks, securities, or commodities (including hedging transactions) through a resident broker, commission agent, or custodian is not merely by reason of such transactions considered as being engaged in trade or business in the United States which would cause it to be classed as a resident foreign corporation. However, a foreign corporation which at any time within the taxable year is otherwise engaged in trade or business in the United States, being a resident foreign corporation, is taxable upon all income derived from sources within the United States, including the profits realized from such transactions. A resident foreign corporation is also required to include in its gross income capital gains, gains from hedging transactions, and profits derived from the sale within the United States of personal property, or of real property located therein.

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No. 15912

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL TRADING, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Preliminary Statement

Petitioner's Brief was filed in this Court on June 18, 1958. Brief for the Respondent was received by petitioner on July 16, 1958. Under Rule 18, subsection 4, petitioner has until August 5, 1958 within which to file this Reply Brief. The argument in this case has been set for Friday, September 12, 1958.

REPLY TO RESPONDENT'S ARGUMENT I

Respondent Has Not Shown That the Tax Court Correctly Held That the Taxpayer Was Not Engaged in Trade or Business Within the United States During the Taxable Years.

In the introduction to respondent's Argument I it is asserted that the Tax Court viewed all of the petitioner's transactions "as a whole". See page 13 of respondent's Brief. This assertion is made in denial of the petitioner's contention that the Tax Court followed a piecemeal and fragmentary approach in deciding the case. Petitioner does not deny that the Tax Court *said* that it was viewing the Record as a whole, but petitioner does deny that the Tax Court did view the Record as a whole. If it be found that the Court below did take the "whole" view, then it is asserted that this was done in an improper manner. Petitioner submits that a reading of the Tax Court's opinion requires the conclusion that the Tax Court—despite its protestation—adopted the separate transaction or "fagot" approach. The respondent's denial cannot conceal this fact.

A. *Both the respondent and the Tax Court misapplied the applicable legal principles.*

Respondent first attempts to articulate certain general principles applicable in the area of the present controversy. Thus, he states that the Courts have defined "business" to be, "that which occupies the time, attention and labor of men for the purpose of livelihood or profit." Respondent then postulates that "carrying on or doing business" means that a corporation "was organized for profit and was doing what it was principally organized to do in order to realize profit." A number of authorities are cited in support of

these very general propositions which are not challenged by the petitioner. Respondent goes on to state that the latter test, to be applied in determining whether a corporation is engaged in a trade or business, has both quantitative and qualitative aspects.

It is necessary to point out, however, as the cases cited by the respondent themselves demonstrate, that the quantitative aspect is of much less significance than the qualitative one. Indeed, a number of Courts, including this Court, have concluded that a very slight degree of activity is sufficient for this purpose. See *Section Seven Corporation* v. *Anglim* (CCA-9, 1943) 136 F. (2d) 155. In addition, a number of the favorable cases involve decisions bordering upon a *de minimis* activity situation. Cf. *Anders I. LaGreide* (1954) 23 T.C. 508 and *Est. of Frances S. Yerburgh,* T. C. Memo. Op., Docket No. 6367, entered December 27, 1945.

The respondent then makes the point that isolated transactions unrelated to the purpose of the corporation as set forth in its charter or which have no relationship to the general pursuit of profit and gain, do not constitute engaging in trade or business.

Petitioner is in general agreement with this proposition of law but asserts that factually it does not apply here. See discussion *infra.* Indeed, it is but a paraphrase of the loaded statement of the issue framed by the Tax Court (R. 52) as follows:

> "Transactions which are not entered into for profit and which do not and in all probability cannot result in a profit, particularly where such transactions are of an isolated and non-continuous nature, will not dictate the conclusion that one is engaged in business. And that, notwithstanding petitioner's categorical statement to the contrary in its brief, we view as the only issue."

There is scarcely any room for doubt as to the answer to such an issue couched in such terms and this may serve to indicate the attitude of the Court below. Moreover, it places in clear perspective the fact that the Court *was not viewing the integrated picture of petitioner's United States activities as a whole.* The proposition could not have been worded in such fashion if *all* activities were being considered. Obviously, certain selected transactions were in mind to produce such a one-sided and distorted statement.

That this was so is demonstrated by the Tax Court's statement that (R. 53):

> "The detailed analysis submitted by petitioner of all of its transactions during the years in controversy shows that only items accounting for a fraction of 1 per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business."

No attempt is made at this point to refute the statement (but see *infra*), however, it is submitted that this shows that the lower Court has excluded from consideration over 99 percent of petitioner's income-producing activities as being non-business. This, petitioner says, is legal error. The *ensemble* of *all* of petitioner's activities viewed as a whole could constitute "engaging in a business" even supposing that some of these separate activities would not. But the Tax Court has failed to consider the ninety and nine and has found the one a sham.

The respondent also concludes that it cannot be charged that there was any clearcut mistake of law made by the Tax Court below. With this position the petitioner is in diametric opposition. As set forth in Argument I of Petitioner's Opening Brief, the Tax Court did err as a matter of law in reaching the conclusion it did. Among the legal errors there mentioned were the following: (a) failure of

the Tax Court to take into account the composite picture of all of petitioner's United States activities; (b) failure of the Tax Court to recognize that petitioner was doing or attempting to do what it had been organized to do; (c) the Tax Court's reliance upon the fact that *some* of petitioner's activities produced little or no profit; (d) the improper emphasis which the Tax Court erroneously placed upon the alleged low *quantum* of activities of petitioner; (e) the failure of the Tax Court to place any legal weight upon the "can" transactions, even after conceding that they were transactions of "substance"; (f) the significance attached by the Tax Court to petitioner's alleged lack of business purpose and tax-savings motive; and (g) the Tax Court's failure to find all of the relevant and material facts from the record.

Respondent has failed to meet or even discuss most of these asserted errors either directly or indirectly. The fact that the respondent does not challenge some of the asserted legal errors committed by the Court below of itself should suffice to warrant a reversal. It also permits the conclusion that respondent has misapplied the correct legal principles.

B. *Both the respondent and the Tax Court have misconstrued and misapplied the facts.*

The respondent here endorses the position taken by the Tax Court below that Section 231(b) of the Internal Revenue Code of 1939 was not intended by Congress to apply in the case of a foreign corporation "merely servicing its investments in this country". (See R. 53 and respondent's Brief page 19.) Despite the fact that the Tax Court attributes the quoted language to "an unequivocal statement" appearing in connection with the enactment of the 1942 Amendment, petitioner is unable to identify the precise language quoted in the Committee Reports and concludes that the words used are not words of art. But even assum-

ing that these words reflect the true Congressional intent, it is submitted that the petitioner's activities were far more than "merely" servicing its investments. Even if it be deemed that the receipt of Servel and Electrolux dividends aggregating over $1,800,000 in the three taxable years and the sale of 55,000 shares of Servel stock constituted "servicing investments" certainly none of the petitioner's other activities would fall in such a category. With the *caveat* that even the activity of "merely servicing investments" would be one of the factors to be taken into account when viewing the composite activities of the petitioner as a whole, petitioner points out that it had many other activities during the taxable years.

Petitioner's "time, attention and labor" were occupied during the taxable years in such other activities as drawing 199 checks on two bank accounts in a total amount of some four million dollars, negotiating seven bank loans aggregating over $6,800,000 and repaying a considerable portion of such loans together with interest, purchasing equipment as an accommodation for a foreign corporation, purchasing and reselling a freight carload of fat, purchasing and reselling 91 freight carloads of tin cans and, most important, negotiating in the United States and abroad with respect to the petitioner's program for financing and erecting recombined milk plants. That all these activities as well as the "servicing" activities consumed time, attention and labor is evidenced by the not insignificant office expenses incurred in California for items such as telephone, telegraph, legal, travel, postage, printing and insurance.

Respondent asserts (p. 22) that none of petitioner's activities, aside from the collection of dividends, relate in any substantial way to any of the purposes for which taxpayer was "mainly" created or to the motive of profit. As indicated in the corporate charter, the purposes for which the petitioner was formed were quite broad and

there is no difficulty in relating the various activities of petitioner with authorizing provisions in the charter. Selling stocks is specifically mentioned as is the holding of stocks. The same is true as to buying, selling, distributing and dealing in milk and milk products. Comparably, the purchase and sale of tin cans designed to hold milk powder is "dealing in supplies * * * used in connection with * * * milk and milk products". The charter likewise authorizes the purchase and sale of machinery as well as "articles", which would cover fat. The usual powers of any corporation would warrant petitioner obtaining bank loans. In short, everything that petitioner did in the United States during the taxable years was an authorized act.

It should be pointed out that the petitioner had been organized, as the previous discussion of the corporate charter provisions indicate, to engage in a wide range of activities. Among these activities and undoubtedly an important activity, was the authorization to deal in milk and all kinds of milk products and related matters. The Record shows that petitioner, principally through its president, Turnbow, made repeated efforts which consumed time, attention and labor, to consummate the milk program. In this connection negotiations took place both in the United States and abroad. This point has been discussed in petitioner's opening Brief and need not be repeated here except to indicate the incorrectness of the Tax Court's finding espoused by the respondent on page 23 to the effect that, "Not only did taxpayer never undertake any activity in connection with the establishment of * * * recombined milk plants * * *" but * * * "never used its assets and borrowings for this or any related purposes."

Turning to the consideration of the Tax Court's and the respondent's assertion that all of petitioner's transactions were either isolated and non-continuous or were not entered into with a reasonable expectation of profit,

the Record will disclose again the error of the position.

It is conceded that the purchase and resale of the freight carload of fat and the accommodation purchase of equipment for a foreign corporation were both isolated and non-continuous transactions. In contrast, the other transactions involved were not of that category, involving activity, scope and continuity. This would include drawing 199 checks, negotiating 7 bank loans, the several sales of Servel stock, the purchase and resale of 91 freight carloads of tin cans, the continuous negotiations here and abroad concerning the erection of recombined milk plants and the receipt of dividends.

So far as the profit motive is concerned it is also conceded that no profit was expected or could be derived from the mere act of drawing checks. The same thing may be admitted with respect to negotiating and repaying bank loans and interest thereon, making the accommodation purchase of equipment for a foreign corporation and the act of incurring various miscellaneous office expenses in Oakland, California. But even these actions indirectly bear on other activities which do involve profits. On the other hand, profit was the direct motive behind: the receipt of the dividends, the sale of the Servel shares, purchase of the carload of fat, the purchase and resale of 91 freight carloads of tin cans, obtaining bank loans, and the negotiations here and abroad concerning the development of the recombined milk program. (Unfortunately, the Record contains no reference to the non-United States activities of petitioner—its extensive Mexican activities and large number of operating subsidiaries there—which would serve to place in perspective some of its United States activities.)

It must be emphasized that the foregoing discussion is based upon a fragmentary or separate transaction approach and not upon the correct method of viewing the entire activity of the taxpayer. The correct viewpoint

recognizes the entirety of the taxpayer's activities, whether or not they are all tinged with the profit motive and regardless of the fact that some may be isolated or non-continuous. To state the proposition differently, a number of unrelated transactions which are isolated and non-continuous can, in the aggregate, be combined with other regular and continuous profit activity so as to constitute all together enough activity, qualitatively, to be a trade or business.

A word must be said with respect to the can transactions which even the Tax Court admitted had "substance". The Court felt that while substantive and real, the can transactions "resulted in no substantial gain, and considering the time spent on them could not, and in several instances actually did not, result in even a nominal net profit," (R. 53). It has already been pointed out that the absence of substantial gain as a matter of law is of no consequence in this case, and the amount of time spent upon these transactions would appear to be immaterial in view of all the other activities of the taxpayer. The alleged absence of even a nominal profit—although this is not so—is likewise irrelevant. Finally, it may be noted that three of the 91 can transactions inovlved sales of cans to a wholly unrelated third party, Farmers Co-Op Creamery, McMinnville, Oregon. See Ex. XXXVII to the Stipulation of Facts.

To characterize—as the respondent does on page 19 of its brief—the taxpayer's activities (other than the collection of dividends) as "little more than a tax-saving-motivated attempt to qualify the collection of dividends as business activity" is to obscure the issue with a false scent. The motive of tax-saving [1] is irrelevant in the present case as

[1] This preoccupation with "tax-savings" is also evidenced by the Tax Court in its opinion where one of the two factual reasons given by the Court below for its holding was that petitioner's conduct, as apparently admitted by petitioner, was dictated, not by a business objective but

demonstrated by *Herbert* v. *Riddell* (DC, Cal., 1952) 103 F. Supp. 369, and *Scottish-American Investment Co.* (1942) 47 B.T.A. 474, affirmed (CCA-4, 1943) 139 F. (2d) 418, affirmed 323 U.S. 119.

For the reasons set forth in petitioner's Brief and the failure of respondent in its Brief to show any valid reasons to the contrary, as demonstrated above, it is submitted that as a matter of fact petitioner was engaged in trade or business within the United States during the taxable years.

REPLY TO RESPONDENT'S ARGUMENT II

The Respondent Has Not Shown That the Tax Court Did Not Abuse Its Discretion by Refusing to Relieve Petitioner of Its Judgment.

The purported basis for the respondent's position here is to avoid multiplicity of trials as well as the established policy against piecemeal review of cases. But multiplicity of trials is not an onerous burden where justice is involved. Moreover, had the Tax Court granted the motion and permitted a new trial only additional evidence would have been submitted, not evidence in duplication of that already con-

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purely by a desire to save taxes. R. 54 A search for such an express admission has been fruitless. Perhaps the Tax Court was mislead by inartful language appearing in the petitioner's Opening Brief in the Tax Court where, on pages 34 and 35, appears the Argument, "It is immaterial that tax avoidance may have motivated petitioner in engaging in trade or business within the United States." What this argument really meant is indicated at the top of page 35 where it becomes apparent that reference is intended to the favorable tax rate accorded a resident foreign corporation engaged in trade or business as compared with a nonresident foreign corporation. At that point the obviously true statement is made that a foreign corporation deliberately and intentionally can engage in a trade or business in the United States in order to obtain this tax advantage. Whatever may be the reason for the misunderstanding between petitioner and the Court below, the reliance upon absence of business purpose by the Court below and by the respondent here is erroneous.

sidered by the Court. And as to piecemeal review, the purpose of the motion was to avoid that precise problem. If the Tax Court had once definitively passed upon *all* of the available evidence it is possible that there would have been no appellate review. In any event, by denial of the motion the Tax Court itself has created a situation where there conceivably could be piecemeal review of this case, the very thing petitioner sought to avoid.

Respondent's first point is that taxpayer failed to submit with its motion for leave to file any information which might have afforded a possible ground for the granting of the motion. The motion to vacate decision and to reopen is set forth in the Record commencing at page 81 and the attached affidavits of Wenner-Gren and Strid appear in the Record commencing at pages 82 and 84, respectively. Reading these affidavits and the motion together certainly should lead to the conclusion that there was an incomplete and partially inaccurate presentation of facts made in the Tax Court. Moreover, the very references made in the affidavits and the motion were ready to be supported by the sworn testimony which was available to the Court at the time the filing of the motion was argued. It can scarcely be said that the Court below did not have either available to it or offered to it those factual resources necessary to reach some decision with respect to the sense of the motion.

Respondent also expresses grave doubt that the facts proffered during the course of the motion argument showed any substantial basis for vacating the decision; nevertheless, respondent is careful thereafter not to discuss a single one of the proffered points. Instead, respondent contents himself with repeating the semantics of the Tax Court with respect to Wenner-Gren's failure to state that he would have testified had he been called, despite the obvious thrust of his affiadvit and the explanation made by counsel.

The important thing is that under Rule 60 of the *Federal Rules of Civil Procedure,* motions of the kind under discussion are to be given broad and sympathetic interpretation and not a narrow and hypertechnical analysis. The obvious purpose of that rule is to avoid an injustice while it can be remedied. This principle should apply here whether it be deemed that the motion was to be supported on the basis of newly discovered evidence, mistake, inadvertence, or "any other ground" as stated by the Rule.

Petitioner is not unaware of the fact that some Courts have ruled against its contention that the Tax Court should be bound by the *Federal Rules of Civil Procedure.* Petitioner is, however, unable to find any square authority in this Court on the question. Even should this Court conclude that the *Federal Rules* do not apply in the Tax Court then at least it would seem that Rule 60 would supply an admirable standard for comparison in passing upon the question of whether the Tax Court abused its discretion.

It is respectfully submitted that the ends of justice are best served here by remanding this case for further testimony in the Tax Court so that all relevant evidence may be considered.

Conclusion

The decision of the Tax Court is erroneous and should be reversed or at least the case should be remanded for further proceedings.

Respectfully,

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No. 15912

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CONTINENTAL TRADING, INC., *Petitioner,*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The Memorandum Findings of Fact and Opinion of the Tax Court of the United States (R. 43-55) are reported as T. C. Memo 1957-164, filed August 30, 1957.

Jurisdiction

The Commissioner determined deficiencies in income tax of the taxpayer in the amounts and for the years as follow:

Year	Deficiency
1948	$ 208,300.59
1949	151,559.71
1950	114,468.53
Total	$ 474,328.83

(R. 14-16)

Taxpayer was advised of this determination by statutory notice of deficiency dated June 28, 1954 (R. 11-18). On November 4, 1954, which was within the 150-day period allowed by the statute for filing petition, the taxpayer filed petition in the Tax Court for redetermination of such deficiencies under the provisions of Section 6213(a) of the Internal Revenue Code of 1954 (R. 6-14). After the hearing, the Tax Court decided, on September 4, 1957, that the deficiencies in income tax as determined by the Commissioner should be sustained (R. 56). Within three months thereafter, i.e., on December 3, 1957, a Petition for Review by this Court was filed by the taxpayer (R. 86-88).

Jurisdiction of this Court is invoked under Sections 7482 and 7483 of the Internal Revenue Code of 1954. Venue lies here under Section 7482(b)(1) because the taxpayer's returns for the taxable years were filed, respectively, in the office of the Collector of Internal Revenue for the First District of California at San Francisco, California (1948) and in the office of the Collector of Internal Revenue for the District of Nevada at Reno, Nevada (1949 and 1950), both of which offices are within the geographical confines of this Circuit.

Questions Presented

I. Was petitioner a resident foreign corporation engaged in trade or business in the United States during the taxable years?

II. Did the Tax Court abuse its discretion by refusing to relieve petitioner of its judgment for the purpose of receiving additional testimony with respect to Question I? This question involves not only the propriety of the Tax Court's refusal but also the question of the appropriate norm to be used in such matters. With respect to the latter point, petitioner asserts that the *Rules of Civil Procedure*

should have been followed by the Tax Court in this regard.

III. Is petitioner entitled to deduct certain amounts accrued for interest, expenses and losses?

Statutes and Regulations

The pertinent statutory provisions and Regulations appear in Appendix A at the end of this Brief.

Statement

The facts, so far as pertinent to the issues here, were found by the Tax Court as follows:

Petitioner, a Panamanian corporation organized in May, 1947, maintained its principal office in Mexico City, Mexico. It filed Federal income tax returns in the United States, the return for 1948 being filed with the Collector of Internal Revenue for the First District of California and the returns for 1949 and 1950 being filed with the Collector of Internal Revenue for the District of Nevada. Those returns stated that petitioner was a resident foreign corporation with "investment" as its principal activity. (R. 44.)

In March, 1948, petitioner established an American address in Reno, Nevada, employed a resident agent there and qualified as a foreign corporation in that state; it continued to be so qualified until March, 1951. (R. 44).

Grover Turnbow, a United States citizen, was petitioner's president during the taxable years (R. 23, 44). Turnbow maintained offices in Oakland, California, where he was associated with various enterprises interested in erecting recombined milk plants in foreign countries. After March, 1948, petitioner's name was added to the business names already appearing on Turnbow's office door. Turnbow was president and sole stockholder of one of these other concerns, International Dairy Supply Co. (R. 44-45)

The person ultimately interested in the success of petitioner was Axel Wenner-Gren.[a] Wenner-Gren held substantial amounts of stock in the Electrolux and Servel corporations prior to petitioner's incorporation as well as sizable and diverse holdings in Mexican and other foreign enterprises. (R. 45-46.)

Prior to the incorporation of petitioner, Turnbow had served as attorney-in-fact for Wenner-Gren in the United States in connection with negotiating loans in this country. Turnbow had become acquainted with Wenner-Gren in Mexico when Turnbow had erected a recombined milk plant in which Wenner-Gren had a financial interest. Petitioner[b] was interested in financing the erection of recombined milk plants in foreign countries but during the taxable years that program failed to materialize because of the inability

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[a] Petitioner has substituted this sentence for the following sentence found by the Tax Court: "Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000.00". This finding by the Tax Court is of doubtful propriety and appears to petitioner to be utterly irrelevant to the issues involved. It is, moreover, based upon the admitted hearsay testimony of Turnbow who was scarcely in a position to have personal knowledge of the facts contained in the finding. (R. 221) The Tax Court's holding is also ambiguous. It is not clear whether the Court intended to find that Axel Wenner-Gren was a direct stockholder in petitioner or whether it was intended to be suggested that he was the ultimate and indirect party at interest. Perhaps the best that can be said is that the Court simply adopted the inartful and unsupported testimony of Turnbow without realizing the ambiguity. As a practical matter, Wenner-Gren was not a direct stockholder of petitioner during the taxable years as the stock record book would disclose.

[b] Petitioner has substituted in this finding of fact the word "petitioner" for "Turnbow". What Turnbow and his various enterprises were interested in doing is of no immediate materiality in this proceeding. It is not clear why the Tax Court made such a finding in the teeth of Turnbow's testimony relating to *petitioner's* interests and activities in that area. For authority for the proposition that it was petitioner rather than Turnbow whose name should have been used in the findings, see the following Record citations: R. 189-194, 203.

to reconvert foreign currency into American dollars and the instability of foreign currencies.[c] (R. 45)

Turnbow hoped [d] that petitioner would assist in financing his construction program of foreign recombined milk plants, but this did not materialize.[e] (R.45-46)

At the beginning of 1948 petitioner was obligated on bank loans in the United States as follows: Bank of America, N. T. & S. A. $1,100,000; Central Hanover Bank & Trust Company, New York, $480,000.00; Teleric, Inc., $926,000.00. The Hanover loan was liquidated during 1948, the loan from Teleric remained outstanding as of the end of 1950 and the loan from Bank of America was paid in August, 1948. (R. 46)

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[c] The affidavit of Birger Strid (R. 84-86) suggests an additional reason for the failure of the program to erect recombined milk plants in foreign countries. That reason was the United States government's program of giving away milk and milk products on a world-wide basis.

[d] The impression given is that Turnbow had originated the concept of dehydrating milk and then recombining it to produce whole milk and that he sought to bring this activity to the attention of petitioner and Wenner-Gren. Precisely the converse was true. Wenner-Gren's activities, antedating association with Turnbow, had involved milk dehydration and recombining. Petitioner had been created by Wenner-Gren to implement his plans for international distribution of dehydrated milk products under the auspices of the United Nations. It was intended to act as a purchasing and selling agent in the United States for milk and milk products and also to serve as a financial reservoir for the international milk operations of Wenner-Gren (Affidavit of Wenner-Gren, R. 82-84; Affidavit of Strid, R. 84-86) Apparently, Turnbow had been employed by Wenner-Gren and then petitioner to assist in the United States phase of the program although this is somewhat difficult to ascertain from the record, due to the bombastic testimony of Turnbow.

[e] This finding by the Tax Court simply emphasizes the strange flavor given to the case by the one-sided testimony of Turnbow. Yet even Turnbow's testimony indicates that he traveled world wide during the taxable years seeking to implement *petitioner's* program of constructing recombined milk plants in various foreign countries. (R. 192-193) The fact that Turnbow hoped that petitioner would assist in financing *Turnbow's* program if *his* program for the establishment of recombined milk plants in foreign countries proved feasible simply puts the shoe on the wrong foot. Perhaps it also explains the ultimate falling out between Turnbow and Wenner-Gren.

During 1948, 1949 and 1950 petitioner had no paid employees in the United States except Turnbow, who received $1,500.00 per month as salary during the last six months of 1950 only. This salary represented part of an over-all settlement effectuated in June, 1950, between Turnbow and Wenner-Gren as individuals, under which Turnbow was to receive stock and cash totalling $105,000.00. (R. 46, 245-6.)

Records maintained in the United States by petitioner consisted of bank statements, checkbooks and certain documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland, California. Petitioner maintained bank accounts in the United States at the First National Bank, Reno, Nevada and at the Bank of America, N. T. & S. A. in San Francisco. (R. 47)

Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances (R. 47).

On its United States tax returns for the taxable years in question, petitioner reported that it derived more than 50 percent of its gross income from sources outside the United States. Gross income from sources within the United States was reported as follows:

Year	Amount
1948	$ 817,791.39
1949	605,635.10
1950	446,863.19

(R. 47)

In 1948 petitioner received dividends on Electrolux and Servel stock aggregating $823,635.50 and incurred a net loss of $5,844.11 resulting from sales of property other than capital assets. In 1949 petitioner received $602,125.50 in similar dividends and received $3,509.90 of "other in-

come in the United States''. Of 1950 income, $441,624.00 represented dividends from Electrolux and $5,239.19 represented additional income ''from sales''. (R. 47)

During 1948 petitioner's activities in the United States included the following:[f]

(a) it collected dividends on Electrolux and Servel stock;

(b) made payment of principal and interest on outstanding loans;

(c) in May it borrowed one million dollars from the Bank of America which was used in acquisition of Mexican telephone companies;

(d) on August 6 it borrowed $1,850,000.00 from the Bank of America, of which it used $1,100,000.00 to repay prior indebtedness of Wenner-Gren to the Bank which petitioner had assumed. The same day petitioner drew checks in excess of the balance of $750,000.00 to make payments of principal and interest on other outstanding indebtedness. (R. 48)

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[f] Not included in the Court's Findings but referred to in the offer of proof made at the argument on petitioner's motion for leave to file motion (R. 256 *et seq.*) are the following additional activities of petitioner referable to this year: (1) in 1948 petitioner loaned more than $600,000.00 to two of its subsidiaries in Mexico to permit them to purchase dehydrated milk powder in carload quantities in the United States (R. 278); (2) in 1948 petitioner negotiated in New York City with a factor to obtain a loan of $350,000.00 in connection with milk operations in Mexico (R. 278); (3) during this year negotiations were under way, conducted in the greater part by Wenner-Gren. These negotiations involved petitioner's attempt to acquire and merge the two independent telephone companies then operating in Mexico. In connection with this effort Wenner-Gren visited the United States on several occasions to negotiate with International Telephone & Telegraph Company, parent of one of the two operating companies in Mexico. Wenner-Gren was specifically authorized to conduct these negotiations for petitioner as shown by the Minutes of the Board of Directors. (R. 278-279)

During 1949 petitioner's activities in the United States included the following:[g]

(a) collected dividends on Electrolux and Servel stock;

(b) made payments on principal and interest on outstanding loans;

(c) secured and repaid short-term advances from Turnbow;

(d) in September it borrowed $1,700,000.00 from the Bank of America which was used to liquidate the outstanding balances of two loans from that Bank;

(e) In December it sold its 55,000 shares of Servel stock, heretofore pledged with the Bank of America to secure loans, and used the proceeds of the sale to pay outstanding obligations to the Bank. (R. 48)

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[g] Not included in the Court's Findings, but referred to in the offer of proof made at the argument on petitioner's motion for leave to file motion (R. 256 *et seq.*) are the following additional activities referable to this year: (1) In 1949 petitioner owned a race track in Mexico City known as the Hippodrome. In that year extensive attempts were made to sell control of this track in the United States. Turnbow conducted these negotiations which unfortunately did not result in a sale (R. 271); (2) in 1949 Turnbow and others negotiated an attempted sale of a subsidiary of petitioner known as The Bank Continental in the United States. Some of the negotiations in this connection were carried on in New York City (R. 272-273); (3) in 1949 attempts were made in the United States to sell another of petitioner's assets, namely the Pan-American Trust Company, which was owned beneficially or controlled by petitioner. Negotiations with respect to this matter were conducted with New York banks (R. 277); (4) also in 1949 Turnbow negotiated with Tidewater Oil Company in the United States in an attempt to get it into the oil business in Mexico under petitioner's auspices. These negotiations were fairly extensive (R. 277); (5) During 1949 Turnbow tried unsuccessfully to interest petitioner in buying the stock of the Golden State Dairy in California. That dairy is now merged into Foremost Dairies forming one of the largest milk combines in the world. Turnbow is president of that concern today (R. 277); (6) in 1949 negotiations were conducted with respect to the acquisition of the telephone companies. These negotiations were conducted primarily by Wenner-Gren (R. 278-279).

In 1950 petitioner's activities in the United States included the following: [h]

(a) it collected dividends on Electrolux stock;

(b) made payments on principal and interest on outstanding loans;

(c) on January 3 it borrowed $2,000,000.00 from the Central Hanover Bank using $1,700,000.00 of the proceeds to repay a loan of the same amount from the Bank of America. Approximately $400,000.00 was transferred to petitioner's account in Mexico City, $110,000.00 was transferred for the account of a Swedish bank and approximately $275,000.00 was transferred to petitioner's account at the Bank of America, much of which was thereafter transferred to petitioner's Mexican accounts;

(d) Petitioner repaid the two million dollar loan. In negotiations with the Central Hanover Bank petitioner represented itself as a Panamanian corporation doing business in foreign countries. (R. 48-49) [i]

In July, 1948, petitioner engaged in a transaction of a type in which it was not previously nor subsequently en-

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[h] Not included in the Court's Findings but referred to in the offer of proof made at the argument on petitioner's motion for leave to file motion (R. 256 *et seq*) are the following additional activities of petitioner referable to this year: (1) In 1950, three years of continuous negotiations culminated in the successful attempt by petitioner to acquire and merge the two largest telephone companies in Mexico into one concern. Much of these negotiations occurred in New York City where Wenner-Gren was dealing with the International Telephone and Telegraph Company, parent of one of the Mexican companies.

[i] At this point on page 49 of the Record appears the following brief paragraph: "The funds borrowed by petitioner were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use." Petitioner has deliberately eliminated that paragraph from these facts. The first sentence is completely gratuitous and petitioner is unable to find any support whatsoever in the Record for the conclusion. The second sentence is irrelevant and immaterial to the issue before the Court. Apparently, the Court below relied upon the inconclusive hearsay testimony of Turnbow on page 251 of the Record which is, incidentally, not the best evidence.

gaged. It purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75. One month later through a company in which Turnbow was interested, petitioner resold the fat to Kraft for $40,248.00. The drop in value was due to a decline in the market.[j] Kraft was requested to make the check payable to petitioner. Petitioner reported the loss on its 1948 tax return. (R. 49)

As an accommodation to a Mexican corporation, petitioner purchased in 1950 equipment for that corporation for which it was reimbursed without profit (R. 49).

In each year, the only other activity reported by petitioner was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948 such reported income amounted to $120.64. In 1949, $3,509.90 was reported and in 1950, $5,239.19 (R. 49-50).

Supply found it necessary, commencing in 1948, to obtain tin cans in connection with its contract for supplying recombined milk products to troops in the Far East. The contract set forth specifications for the necessary cans to be bought in the United States. In 1948 Supply procured cans from the Western Can Company. In December, 1948, petitioner undertook to place with Western[k] an order covering the same type of cans and bearing the same markings as Supply had theretofore ordered in its own name from Western. Western billed petitioner at the same price which Supply had paid Western on an earlier order. Petitioner's order was telephoned to Western by either Supply's procurement department or Turnbow's secretary on December 8, 1948. (R. 50)

The same day that petitioner's order was telephoned to

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[j] Petitioner has added this sentence which was not contained in the Tax Court findings, but see R. 251.

[k] At this point the Tax Court had the phrase "in its name". Petitioner has deleted that clause here because it is meaningless.

Western, Supply prepared an export purchase order for the cans addressed to petitioner. Petitioner then forwarded to Western a written confirmatory order in its name and on December 16, 1948 paid Western by check for the cans. Petitioner invoiced Supply for the cans at a 5 percent increase in price and Supply paid the invoice within 10 days of the invoice date. (R. 50-51)

In 1949 and 1950 petitioner utilized the same recording and routing of orders for cans needed by Supply. This occurred on 37 occasions in 1949 and 53 occasions[1] in 1950. Petitioner regarded the proceeds as income and reported the profit from the sales of the cans on its tax returns for the respective years. Supply in every instance paid petitioner within 10 days of petitioner's payment to Western. After 1950, Supply recommenced ordering and purchasing cans directly from Western.[m] (R. 51) Petitioner also purchased and resold 3 carloads of tins to another company, Farmers Co-op Creamery, one carload in 1949 and two in 1950.[n]

During the taxable years petitioner maintained a *de facto* business office in Oakland, California which was

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[1] "Occasions" as used here by the Tax Court also means "carloads". A carload was shipped on each occasion. See Stipulation 16, X and parts thereof. The Tax Court found 48 occasions for 1950.

[m] In connection with the finding contained in this paragraph it must be indicated that petitioner has deliberately omitted the following sentences appearing in the Tax Court findings: "There was no business purpose connected with the can transactions engaged in by petitioner. It never used its Nevada office in these operations. It carried no inventory of cans and ordered no cans other than those used by Supply." The first sentence deleted contains an unsupported conclusion. The second sentence appears to be utterly meaningless, as the negotiations in connection with the cans were handled through Turnbow's offices in California. The last sentence is deleted because the absence of inventory in these types of situations is meaningless as a matter of law. See discussion of this point in Argument I-A.

[n] This was not found by the Tax Court but see Stipulation, Ex. XXVIII, p. 3, Note 2.

located in the office of its president, Grover Turnbow; in that office both Turnbow and his secretary devoted a considerable amount of time and activity to the interests and activities of petitioner (R. 120-124). In connection with these activities various miscellaneous office expenses were incurred, including postage, insurance, telephone, telegraph, legal, printing, photostating and travel (Stipulation 16, XIV and Ex. XXXI, thereof). In addition to Turnbow, petitioner's president, M. W. Dobrzensky, petitioner's vice-president (R. 44) and Franklin A. Schulze, petitioner's secretary-treasurer (R. 179) were located in California. During the taxable years petitioner's president negotiated 7 bank loans aggregating $6,800,000, negotiated the sale of 55,000 shares of Servel stock, negotiated the purchase of one carload of fat and the resale thereof, negotiated the purchase of equipment for a foreign corporation, negotiated the purchase and sale of 91 carloads of tin cans at a profit, drew 179 checks against one bank account aggregating $2,209,036.52, drew 20 checks against another bank account aggregating $2,065,987.97, paid miscellaneous office expenses as indicated, maintained surveillance of the collection of cash dividends on stock owned by petitioner aggregating $1,867,385.00, repaid various loans of petitioner and made payments of interest thereon, negotiated in his California office and abroad in connection with petitioner's endeavor to establish foreign recombined milk plants.[o] (Stipulation 14, 15, 16, R. 189-193)

During 1948, 1949 and 1950 petitioner was engaged in a trade or business within the United States within the meaning of Section 231(b) of the Internal Revenue Code.[p]

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[o] The facts contained in this paragraph were not found by the Court below but are clearly evident from the Record or were stipulated.

[p] This is precisely the converse of what was concluded by the Tax Court and petitioner asserts that it is the correct conclusion based upon the Record.

Statement of Points to be Urged

I. The Tax Court erred by holding that petitioner was not engaged in a trade or business within the United States within the meaning of Section 231(b) of the Internal Revenue Code.

II. In reaching that holding the Tax Court erred by failing to base such holding upon substantial evidence and as a result it was clearly erroneous.

III. The Tax Court erred by failing to relieve the petitioner of its judgment as required by the *Rules of Civil Procedure* because of mistake, inadvertence, newly discovered evidence, or other valid reason for reopening the Record and taking additional testimony to prevent an unjust result.

IV. The taxpayer desires to preserve its right seasonably to argue the deductibility of certain expenses, interest and losses; this issue was neither reached nor decided by the Court below, but will have to be in the event the trade or business holding is reversed.

Summary of Argument

As a foreign corporation, petitioner sought to and did engage in a trade or business in the United States. That business had originally been intended to include the purchase of milk and milk products in the United States, particularly dehydrated milk, as well as the financing of such activities through other corporations, together with the erection and operation of recombined milk plants in milk-deficient areas of the world under the auspices of the United Nations. Due to various adverse factors the milk program never reached fruition but petitioner, nevertheless, besides negotiating extensively in the foregoing connection also engaged in other activities in the United States, with the result that the combination of its various activities constituted a trade or business in this country.

During the taxable years 1948, 1949 and 1950, it qualified as a foreign corporation with a resident agent in Nevada and had an office in California. Three officers of petitioner resided in California and the president of petitioner, one of these, devoted considerable time during the taxable years to the business affairs of petitioner in the United States.

Among the various activities carried on by petitioner in the United States during the taxable years (principally through its president) were the following:

(a) collected $1,867,385.00 in dividends upon United States stocks;

(b) engaged in financial activity including negotiation of 7 large American bank loans aggregating $6,800,000.00 and the repayment of some parts thereof, including interest;

(c) conducted extensive negotiations in the United States and abroad in connection with the projected milk program;

(d) purchased and resold 91 carloads of tin cans;

(e) purchased and resold a carload of fat;

(f) negotiated purchase of equipment for a foreign corporation;

(g) drew 199 checks against two bank accounts, which items aggregated $4,275,024.49;

(h) borrowed sizable sums from petitioner's president and repaid them;

(i) sold 55,000 shares of Servel stock; and finally,

(j) incurred and paid various miscellaneous office expenses including travel, postage, telephone and legal expenses.

Needless to say, if the Court had taken into account the additional United States activities indicated in Argument II, the situation would be *a fortiori* a trade or business.

The principal fault with the Tax Court's holding is its consistent refusal to view petitioner's activities in the United States as a composite whole rather than separately. The Court erroneously placed significance upon an alleged lack of business purpose which is refuted below. It also attributed significance to the small size of the dollar profits involved in certain transactions and failed to place proper emphasis upon the total character of the petitioner's activities.

Finally, the Court erred in finding incomplete and partially inaccurate facts and in reaching ultimate fact conclusions not supported by substantial evidence.

The Court below also erred by failing to relieve petitioner of its judgment upon a showing of reasonable cause for believing that additional, convincing and material testimony could have been presented but was not presented below, due either to mistake, inadvertence, newly discovered evidence, or other justification for invoking Rule 60(b) of the *Rules of Civil Procedure.*

The question of the deductibility of certain interest expenses and losses was neither reached nor decided by the Court below, such issue being deemed to be subordinate to the trade or business issue. If petitioner ultimately prevails

on the trade or business issue it should prevail here also or, it should be able to present evidence with respect to the deductibility of such items. The purpose of the third argument is simply to preserve petitioner's right seasonably to assert such contentions if necessary.

ARGUMENT I

The Tax Court's Decision That Petitioner Was Not Engaged in a Trade or Business in the United States Was Erroneous in Law and Not Based upon the Evidence and It Should, Therefore, Be Reversed.

This is the major area of controversy and is concerned with the mixed question of whether or not petitioner was engaged in a trade or business in the United States during the taxable years. The Tax Court below held that petitioner was not so engaged in a trade or business. Petitioner disagrees emphatically with that determination and has appealed this issue to this Court, asserting that it was engaged in a trade or business in the United States. The first portion of this argument deals with the Tax Court's holding and the basis thereof. The second portion of this argument analyzes the Tax Court's findings of fact and finds them in significant measure to be clearly erroneous.

A. *The Tax Court erred as a matter of law in holding that petitioner was not engaged in trade or business in the United States within the meaning of Section 231(b) of the Internal Revenue Code of 1939.*

Petitioner was a foreign corporation chartered in Panama, between which country and the United States there was no treaty affecting the taxation of income. Petitioner contends that it qualifies as a resident foreign corporation within the meaning of Section 231(b) of the Code.

Where a foreign corporation was a resident, that is, was engaged in trade or business within the United States, it was taxed only on net income derived from sources within the United States. Section 14(c) of the Internal Revenue Code provided that such a foreign corporation should be

taxed in an amount equal to 24 percent of the normal tax net income. Section 15 provided for a 14 percent surtax on such corporations (the surtax was somewhat higher in 1950). Both taxes were to be computed after credit for 85 percent of dividends received from domestic corporations as provided in Section 26(b).

Therefore, if petitioner qualified as a resident foreign corporation engaged in trade or business in the United States, its non-dividend United States income would be taxed at an aggregate rate of 38 percent; the dividend portion of its United States income would be taxed at 5.7 percent in 1948 and 1949 (15 percent of dividends at 38 percent) while the 1950 rate would be something over 6 percent.

Alternatively, if the government is correct and petitioner was a foreign corporation not engaged in a trade or business, it was subject to a flat 30 percent tax on gross fixed or determinable income from United States sources. (Section 231(a))

The Tax Court below found that petitioner was taxable for the years in issue under Section 231(a) rather than 231(b). The Court held that petitioner was not engaged in trade or business in the United States during the taxable years. Was the Tax Court in error in so holding? Petitioner says so.

At the outset it must be emphasized that petitioner was not organized in Panama in execution of a scheme to minimize or reduce taxes on existing United States income, as implied by the Tax Court. Not until shortly after its incorporation in 1947 did Wenner-Gren contribute any substantial blocks of stock in Electrolux and Servel corporations to petitioner. Servel and Electrolux were domestic American corporations. During the three taxable years petitioner collected dividends from these stocks (from

sources within the United States) aggregating $1,867,-385.00. Had the Wenner-Gren retained ownership of these shares during the taxable years he would have been taxed individually upon the dividends thereon at the flat rate of 10 percent under the provisions of the Swedish-United States Income Tax Convention (see Article VII of the Convention and paragraph 3 of the Protocol thereto). Such a tax would have aggregated $186,738.50.[1] The same dividends received by petitioner would be taxed at an effective rate of about 6 percent, if petitioner were a resident and at 30 percent if petitioner were a non-resident.

However, it can scarcely be supposed on the record that petitioner would have confined its United States activities solely to collecting such dividends. As far back as 1939, the Commissioner had ruled that the mere receipt of dividends on domestic stocks by a foreign corporation did not constitute engaging in a trade or business in the United States. See *IT 3260*, 1939-1 Cum. Bull. (Part 1) 199. Mani-

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[1] From the point of view of Axel Wenner-Gren it was considerably more expensive to have operated through corporate form in the United States than to have held the Servel and Electrolux stock in his own name. The actual expenses incurred by having petitioner operate in the United States, which would not otherwise have been incurred, were as follows:

Settlement with Turnbow, June 1950 (R. 46)	$105,000.00
Salary for Turnbow, last 6 months of 1950 (R. 46)	9,000.00
Legal fees, Fitzgerald, Abbott & Beardsley (R. 39, 40, Ex. XXXI)	23,107.19
Office costs, travel expenses, etc. of Oakland, Cal. office (R. 39, 40, Ex. XXXI)	7,124.70
Taxes actually paid in United States (R. 16)	85,886.58
Total	$230,028.47

If, in addition, the deficiencies here in issue are taken into account (the sum of $474,328.83 plus interest thereon) as well as costs incident to this appeal it may be seen that Wenner-Gren received no particular tax savings by transferring the American stocks to the petitioner.

festly, petitioner could not have intended its United States business activities to be confined simply to collecting dividends, else it would fail to qualify as "engaged in a trade or business". The purposes for which the corporation was formed were broader than mere dividend collecting as is indicated by the corporate charter. See R. 21-22. Moreover, the testimony of Turnbow throughout the Record indicates continuous but futile attempts to implement the recombined milk program for petitioner. The conclusion would seem to be required that there was here no real motive of tax avoidance; had petitioner's other contemplated United States activities borne fruit all such income other than dividends would have been taxed at an effective rate of 38 percent.

The Tax Court failed in its decision to follow the accepted rule that in ascertaining whether a corporation is engaged in trade or business in a given jurisdiction, its activities therein must be regarded as a *whole*—that a fagot is made of a bundle of sticks, and not that the sticks are separately broken and thrown into the discard without being assembled into a fagot. The Tax Court said (R., p. 53):

> "The detailed analysis submitted by petitioner of all of its transactions during the years in controversy shows that only items accounting for a fraction of 1 per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business. See *Linen Thread Co., Ltd.* 14 T.C. 725. Such transactions resulted in no substantial gain, and considering the time spent on them they could not, and in several instances actually did not, result in even a nominal net profit."

In making this statement, the Tax Court ignored the dividends received from substantial holdings by petitioner

of domestic stocks. Although the Commissioner ruled some years ago that the mere receipt of dividends on domestic stocks by a foreign corporation does not constitute the engaging by it in trade or business in the United States *(I T. 3260,* 1939-1 C. B. (Part 1) p. 199), this activity must be considered in connection with other activities in determining whether a foreign corporation is so engaged. The statute (sec. 211(b) I.R.C. of 1939; sec. 871(c)(2) of I. R.C. of 1954, and corresponding provisions of predecessor law) has long provided that "the phrase 'engaged in trade or business within the United States' . . . does not include the effecting, through a resident broker, commission agent, or custodian, of transactions in the United States . . . in commodities . . . or in stocks or securities". But this statutory exclusion has been disregarded by the courts in instances *where the exempted activity was found to be combined with other elements.*

For example, in *Adda* v. *Com.* (CCA-4, 1948), 171 F. (2d) 457, the Court of Appeals for the Fourth Circuit held that a nonresident alien was engaged in trade or business in the United States because of the fact that there was added to his transactions in commodity exchanges the fact that these transactions were effected by his brother as his agent on American soil under a discretionary power-of-attorney vested in the brother. And in *Com.* v. *Nubar* (CCA-4, 1950), 185 F. (2d) 854,the same Court of Appeals held that extensive trading in the United States in stocks and commodities by an alien constituted the engaging by him in a trade or business, the element of *extensiveness* when added to statutorily exempt activities being deemed by the Court to override the exemption.

By parity of reasoning, the considerable activities of petitioner for the years in issue, which will be shown below, when added to the extensive receipt of dividends by petitioner on American soil should be deemed to con-

stitute engaging in trade or business in the United States.

Although it did not have to do so in seeming defiance of a statutory exemption, the Supreme Court of the United States long ago enunciated this rule of *integration* in *Edwards* v. *Chile Copper Co.,* (1926), 270 U.S. 452, in a case involving a suit for refund of taxes imposable upon domestic corporations organized for profit "with respect to carrying on or doing business." In this case, the plaintiff corporation owned the capital stock of a subsidiary operating abroad, issued its own bonds secured by the subsidiary's stock and paid over the proceeds to the subsidiary, maintained an office in the United States, held director's and stockholders' meetings here, kept certain books and accounts in the United States, and did here incidental acts necessary to maintain the corporate existence. In deciding that the plaintiff corporation was "carrying on or doing business" in the United States, a phrase obviously synonymous with "engaged in trade or business" in the United States, the Court, speaking per Mr. Justice Holmes, said:

> "*It* (the corporation) was organized for profit and *was doing what it was organized to do* in order to realize profit. The cases must be exceptional, when such activities of such corporations do not amount to doing business in the sense of the statutes . . . *we cannot let the fagot be destroyed by taking up each item of conduct separately and breaking the stick. The activities and situation must be judged as a whole* . . ."[2] (Emphasis supplied)

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[2] This rule of integration announced by Mr. Justice Holmes was followed in *Helvering* v. *Scottish American Investment Co.* (CCA-4, 1943), 139 F. (2d) 419, aff'd (1944) 323 U.S. 199, and affirming 47 B.T.A. 474 (1942). In that decision the Court of Appeals said:

> ". . . the proper approach to this problem is not to consider each activity and power separately and to analyze it apart so as to

Consider petitioner's other activities.[3]

In 1948, as found by the Tax Court (R. 48-9-50) besides collecting dividends on the large blocks of Electrolux and Servel stock, petitioner made payments of principal and interest on outstanding loans, borrowed $1,000,000 and $1,850,000, drew checks for more than $750,000 to make payments of principal and interest on outstanding indebtedness, purchased a carload of milk fat which it resold at a loss of several thousand dollars, and bought a number of tin cans which it sold a few days later at a 5% profit resulting in a small amount of income.

In 1949 (R. 48-9-50), besides collecting similar domestic dividends on a larger scale, petitioner made payments on principal and interest on outstanding loans, secured and repaid short-term advances, borrowed $1,700,000, liquidated two outstanding loans, sold 55,000 shares of Servel stock previously pledged to a domestic bank, paid outstanding obligations to a bank, and purchased and sold carloads of tin cans on 37 occasions, reaping a 5 percent profit amounting to several thousand dollars from these latter transactions.

In 1950 (R. 48-50) besides collecting large amounts of dividends on Electrolux stock, petitioner made payments of principal and interest on outstanding loans, borrowed $2,000,000 from a domestic bank, repaid a loan of $1,700,000, transferred $400,000 to its account in Mexico, made other substantial transfers of money, repaid a loan of $2,000,000, and purchased and sold carloads of tin cans on

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determine whether that one activity or power, considered alone, can be construed as casual or accidental. But *the composite picture of these activities and powers must be viewed as an integrated whole* and a solution must be sought accordingly. The strength of a rope is not that of a single strand. . . .". (Emphasis supplied)

[3] The following description of petitioner's activities is simply that as found by the Tax Court and does not, therefore, include any of those activities not covered by the Record and discussed in Argument II. The additional activities referred to would support this argument *a fortiori*.

53 occasions, deriving a profit of several thousand dollars from these latter transactions.

It is stipulated (R. 23) that Grover D. Turnbow, of Oakland, California, was president of petitioner during the years in issue. It is further shown that he attempted during the years in issue to negotiate projects for the erection of recombined milk plants to be in considerable measure financed by petitioner, which had ample funds in the United States in the form of unliquidated shares of stock and access to further ample funds from foreign sources. Under these facts, it is clear that petitioner, to use the language of Mr. Justice Holmes in *Edwards* v. *Chile Copper Co., supra,* "was a good deal more than a mere conduit" for others, and that "its brains or at least the efferent nerve without which" petitioner "could not move" in the United States existed here in the form of its president, who, according to petitioner's by-laws (R. 23, Ex. 1) was "the chief executive officer" of petitioner, had "general and active management of the business of the corporation subject to the board of directors", and the power to "execute contracts and other obligations authorized by the board." When it is further noted that petitioner, besides the power to invest in stocks, etc. (R. 22), had specific power (R. 21-22) to make and deal in milk products, and that the president negotiated, frequently on American soil (R. 189 to 194, 203-4, 211-2, 214) for projects in which petitioner was to be a principal financial participant, the conclusion seems unavoidable that petitioner was "engaged in trade or business in the United States."

This conclusion is supported by the views of the Court of Appeals for the Second Circuit in *Union Internationale de Placements* v. *Hoey* (CCA-2, 1938), 96 F. (2d) 591. The case involved the question whether a foreign corporation was engaged in trade or business in the United States,

for purposes of the former Federal capital stock tax prescribing this test for liability of foreign corporations. Although the Court decided, by assimilating the capital stock tax test to that of that of the income tax law, that the corporation there was not engaged in trade or business in the United States merely by virtue of the purchase and sale of securities in the United States by orders transmitted from abroad through resident banks and brokers acting for the public in general, nevertheless, in reaching this conclusion the Court used the following language directly applicable to the case at bar:

> "The question, therefore, arises whether or not the foreign corporation was present as a corporation within the taxing jurisdiction. Only when it is so present does it become relevant to consider the nature and degree of its business activities within the jurisdiction for the purposes of taxation. *Butler Bros. Show Co.* v. *U. S. Rubber Co.,* 156 F. 1 (CCA-8; *Procter & Gamble Co.* v. *Newton,* 289 F. 1013. To subject such a corporation to taxation for doing business, the transactions must not only show that the corporation was present, but also that it was active.
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> "Carrying on or doing business has received construction in the cases involving the amenability of a corporation chartered in one jurisdiction to the service of process in another jurisdiction. *Tanza* v. *Susquehanna Coal Co.* 220 N. Y. 259. In such cases, as in taxation and regulation cases, it has been held essential that the foreign corporation be present as a corporation in the sense of having a place of business or a branch office or an agent or representative. *People's Tobacco Co.* v. *Amer. Tobacco Co.,* 246 U. S. 79, 86; *Henry M. Day Co.* v. *Schiff, Lang & Co.,* 278 F. 533 . . . .

> "This appellant could come into the jurisdiction and be present here only by sending into the jurisdiction or maintaining here its officers or other agents. . . ."

This is precisely what petitioner did in the case at bar. It sent into (i.e. it had in) the jurisdiction (which was the United States as a whole for purposes of the test in the instant case) its principal officer or president, its vice-president, and its assistant secretary. These persons were of course the "agents" of petitioner. The record shows that the president of petitioner as its chief executive officer was habitually in the United States as a resident thereof and acting on behalf of petitioner. This presence, combined with the qualification of petitioner in the United States, accompanied by the existence of a statutory agent in Nevada, and its habitual activities shown above, satisfy the requirements of the foregoing language from the *Union de Placements* case, *supra.*

In a very recent case, *United States* v. *Balanovski et al.*, (CCA-2, 1956) 236 F. (2d) 298, cert. den. 352 U. S. 968, the Court of Appeals for the Second Circuit held that where the partner of a foreign partnership, remaining for some time on American soil, negotiated purchases in the United States, inspected merchandise, maintained an office and a bank account, and generally did all things to complete transactions of resale, the partnership was engaged in trade or business in the United States and taxable on the profits from resales effected in this country. In this case, the partnership claimed a non-resident status, but if it had been a *corporation* claiming such the Court would clearly have reached the conclusion under the facts presented that it was a *resident* foreign corporation (i.e., one engaged

in trade or business in the United States) and would have been forced to concede that it was entitled to the 85 percent credit in respect of dividends received and to the statutory deductions permitted to resident foreign corporations—*the test, of course, being the same regardless of whether the contention of residence is raised by the government or by the taxpayer.*

In the *Balanovski* case, the year in issue was 1947, and during its course 24 transactions of purchase and resale occurred, and although they were large in amount, they were less numerous than the transactions of purchase and resale into which petitioner in the case at bar entered in 1949 and 1950, which were respectively 37 and 53 in number. In the *Balanovski* decision, the Court of Appeals said:

> "Balanovski's activities on behalf of CADIC [the partnership] were numerous and varied and required the exercise of initiative, judgment, and executive responsibility. They far transcended the routine or merely clerical. Thus he conferred and bargained with American bankers. He inspected goods and made trips out of New York State in order to buy and inspect the equipment in which he was trading. He made sure the goods were placed in warehouses and aboard ship. He tried to insure that CADIC would not repeat the errors in supplying inferior equipment that had been made by some of its competitors. And while here he attempted 'to develop other business' for CADIC.
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> "Throughout his stay in the United States Balanovski employed a Miss Alice Devine as a secretary. She used, and he used, the Hotel New Weston in New York City as an office. His address on the documents involved in the transactions was given as the Hotel New Weston. His supplier contacted him there, and that

was the place where his letters were typed and his business appointments arranged and kept. . . ."

At another place, the Court of Appeals said of Balanovski:

". . . Acting for CADIC he engaged in numerous transactions wherein he both purchased and sold goods in this country, earned his profits here, and participated in other activities pertaining to the transaction of business. Cases cited in support of the proposition that CADIC was not engaged in business here are quite distinguishable. Cf. *The Linen Thread Co., Ltd.,* 14 T. C. 725; *Jorge Pasquel,* 12 T.C.M. 1431; *The Amalgamated Dental Co., Ltd.,* 6 T.C. 1009; *European Naval Stores Co., S.A.,* 11 T.C. 127; *R. J. Dorn & Co.,* 12 B.T.A. 1102.

The foregoing language of the Court of Appeals in the *Balanovski* opinion reveals striking similarities between the factual pattern in that case and in the case at bar. In both cases, the taxpayer concerned had an authorized discretionary agent in this country, who made a series of purchases and quick resales. In both cases the representative participated in other activities pertaining to the transaction of business. In both cases: "While maintaining regular contact with his home office, he was obviously making important business decisions." In both cases, "He maintained a bank account there for partnership [corporation] funds." In both cases: "He operated from a New York [Oakland] office through which a major portion of CADIC's [petitioner's] business was transacted."[4] The citations

[4] In the case at bar, petitioner's president "conferred and bargained with American bankers," as did Balanovski, and arranged loans and their repayments as well as the sending of money to Mexico for operations of petitioner there. The record shows (R. 25-26) that 199 checks were drawn on behalf of the petitioner during the years in issue against domestic bank accounts showing a plenitude of business transactions.

of the Court at this point seem equally applicable to both cases: "See *C.I.R.* v. *Nubar,* 4 Cir., 185 Fed. (2d) 584, 588, certiorari denied 341 U.S. 925; *Fernand C. A. Adda,* 10 T. C. 273, 277, 278, affirmed per curiam *Adda* v. *C.I.R.,* 4 Cir., 171 Fed. (2d) 457, certiorari denied 336 U.S. 952; *Pinchot* v. *C.I.R.,* 2 Cir., 113 Fed. (2d) 718, 719; *Jan Casimir Lewenhaupt,* 20 T. C. 151, 163."

It is submitted that on the basis of the decision of the Court of Appeals in the *Balanovski* case, the conclusion is inevitable that petitioner was clearly engaged in trade or business in the United States upon consideration of the totality of its business transactions. The fact that its profits from the purchase and sale of tin cans were small should be deemed to be immaterial, when added as a stick to the bundle making up the fagot. The numerous contracts for purchase were in fact made, the responsibility in law for payment was that of petitioner and moderate profits were in fact obtained on the resales. The absence of an inventory in tin cans should be disregarded as of no effect in view of the *Balanovski* decision, in which the foreign partnership there found to be engaged in trade or business in this country, carried no inventory of the equipment which it immediately resold upon purchase, merely receiving the bills of lading from the bank momentarily under trust receipt and arranging for shipment to the ultimate foreign buyer, which paid the freight and insured the equipment in transit, with the domestic bank retaining control in transit through return to it by the partner of the bills of lading taken under trust receipt.

Even if Mr. Justice Holmes' accepted theory of consideration of the totality of activities were erroneously disregarded in the case at bar, and the stick of transactions in tin cans were considered alone, the Tax Court itself has clearly found in a recent decision that the smallness of

income (profits) does not preclude a trade or business activity in the United States.

In *Frank Handfield* (1955), 23 T.C. 633, the petitioner there involved was a citizen and resident of Canada, who manufactured post cards in Canada which were shipped on consignment to the United States under an agreement between him and an American news company, under which it was found that the news company was petitioner's exclusive agent for distributing petitioner's cards in the United States to dealers who attempted to sell the cards. The year in issue was petitioner's fiscal year ending July 31, 1949. The proceeding in the Tax Court involved a deficiency of only *$639.70.* Petitioner had shown net income of only $883.70, after claiming deductions of $2,800, $171.67, $1,200, and $667.70. Yet no principle of *de minimis* prevented the Tax Court from holding not only that petitioner was engaged in trade or business in the United States because of the presence here of the domestic agent, but that he was so engaged through a "permanent establishment" within the meaning of the Canadian-United States income tax convention, with the consequence that despite the limitations of the convention on double international taxation of the same profits, United States tax applied. It therefore ill becomes the Tax Court to have held below in the case at bar that (R. 53):

> ". . . Such transactions resulted in no substantial gain, and considering the time spent on them they could not, and in several instances actually did not, result in even a nominal net profit."

In other words, the lack of a *substantial gain* was deemed of no consequence by the Tax Court in the *Handfield* case when it found that taxpayer to have been engaged in trade or business in the United States, and this fact seems to

have been overlooked by it when it rendered the decision below in the case at bar. As to the statement that the transactions (meaning those in cans, and that in milk fat) could not, and in several instances actually did not, result in even a nominal net profit, the attention of the Court is called to the fact that apart from the sale at a loss of about $6,000 in 1948 of a carload of milk fat, petitioner's purchases and resales in question (those of cans) resulted in a small profit in each of the years in issue (R. 49-50). The only other transaction of purchase of tangible goods seems to have been a purchase purely as an accommodation for a Mexican corporation (doubtless related) in which no profit was desired, and certainly such a transaction casts no stigma on the fagot. The mere recitation of these facts seems a refutation of the foregoing quotation from the Tax Court.

With further reference to the question of *quantum* of profits as an element in the phenomenon of engaging in trade or business, the attention of the Court is directed to a recent decision of a sister Court of Appeals—that of the Seventh Circuit in *Reiner* v. *U. S.* (CCA-7, 1955), 222 F. (2d) 770. In this case the taxpayer had constructed a house in Austria in 1937, and until she left Austria in 1938 (probably because of the Anschluss with Germany) the house was used partly as her residence and partly as the medical office of her husband. When the taxpayer left Austria in 1938 she appointed a doctor to manage the property for her, who rented it to several tenants. In 1944, the house was severly damaged by a bomb. The Court of Appeals held that the taxpayer's loss was attributable to the operation of a trade or business regularly carried on by her, and that the loss in 1944 could therefore be carried back and forward to other years within the meaning of the applicable Federal tax statute (sec. 122, I. R. C. of 1954). It had been found below that the basis for the residence

was about $51,000, and that the loss from bombing was about $36,000. From this it seems manifest that the income per annum from the operation of this single house was relatively small in amount, a few thousand dollars each year.

The Tax Court itself, in *Anders I. La Greide* (1954), 23 T.C. 508 had already clearly rejected the theory of *de minimis* when ascertaining that the taxpayers (husband and wife) had reported rental receipts for 1949 of *$250,* diminished by $20 of repairs, all related to a single inherited house. Knowing the triviality of the amount involved, the Tax Court nevertheless said:

> "The first issue to be considered is whether or not the renting out in 1949, by Alice LaGreide, of a single piece of residential real estate, amounted to the operation by her of a trade or business regularly carried on. She inherited the property from her mother in 1948 . . . Since the time of the mother's death, the property was either rented or available for renting, and was actually rented during part of 1948 and almost all of 1949.
>
> "It is clear from the facts that the real estate was devoted to rental purposes, and we have repeatedly held that such use constitutes use of the property in trade or business, regardless of whether or not it is the only property so used. *Leland Hazard,* 7 T.C. 372 (1946). See also *Quincy A. Shaw McKean,* 6 T.C. 757 (1946); *N. Stuart Campbell,* 5 T.C. 272 (1945); *John D. Fackler,* 45 B.T.A. 708, 714 (1941), aff'd (C.A. 6, 1943) 133 F. 2d 509. We add that the use of the property in trade or business was, upon the facts, an operation of the trade or business in which it was so used (see *Industrial Commission* v. *Hammond,* 77 Colo. 414, 236 Pac. 1006, 1008). It is clear, also, that the business

> was 'regularly' carried on, there having been no deviation, at any time, from the obviously planned use.'' [5]

See also *Frances S. Yerburgh Est.*, T.C. Memo. Op. Docket No. 6367, entered December 27, 1945, where the magnitude of the business is held to be not significant whereas the character of activities is.

The attention of the Court is further directed to two of its own precedents in the Ninth Circuit which seem to be favorably applicable to the contention of petitioner in the case at bar. The first is *Ehrman* v. *Com.* (CCA-9, 1941), 120 F. (2d) 607. In this case, the taxpayers, as heirs of an estate, had sold 120 lots of land in 1934 and 186 lots in 1935. The year in issue was 1935, in which they had received about $160,000 under contracts of sale. They urged that the sales were solely for purposes of *liquidation* of the inheritance, and that therefore they had derived only capital gains and were not carrying on a ''trade or business'' producing ordinary income. After declaring that it had already rejected the liquidation test in *Richards* v. *Com.* (CCA-9, 1936), 81 F. (2d) 369, and *Com.* v. *Boeing* (CCA-9, 1939), 106 F. (2d) 305, this Court cited its own language in the *Boeing* case saying:

> ''From the cases it would appear that the facts necessary to create the status of one engaged in a 'trade or business' revolve largely around the frequency or continuity of the transactions claimed to result in a 'business status' ''—citing its own decision in *Welch* v. *Solomon* (CA-9, 1938), 99 Fed. (2d) 41.[6]

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[5] This means the constant receipt for a year or more of $25 a month.

[6] Petitioner has shown above that, following Mr. Justice Holmes' rule of integration into a fagot, petitioner had great frequency or continuity of transactions in the United States resulting in the conduct of a trade or business in this country.

In the *Ehrman* case, this Court made the further highly significant statement, which must be taken to be the law of this Circuit:

> ". . . . . They [the taxpayers] refer to the property as having been acquired by them in a 'damaged' state. *We fail to see that the reasons behind a person's entering into a business* whether it is to make money or whether it is to liquidate—*should be determinative of the question of whether or not the gains resulting from sales are ordinary gains or capital gains.* The sole question is—were the taxpayers in the business of subdividing real estate? . . . . . ."
> (Emphasis supplied)

Because of the frequency or continuity of the transactions, this Court, under its own rule in *Boeing,* found the gains to have been derived from the conduct of a trade or business, although it seemed to recognize that the intention of the taxpayers in the operation was not so much to make money as to liquidate. In the case at bar, still remembering the rule of the fagot, petitioner's intention was clearly to make money on dividends while developing in the United States a program for investment as a participant in the production of recombined milk, in which it also expected to make money, buying and selling cans in transactions for the years in issue at a profit of some thousands of dollars, and cooperating in the United States through its president and other officers with other guiding representatives of petitioner at its main business office in Mexico, whether by negotiating for and obtaining loans and remitting part of the proceeds or otherwise. The number of 199 checks drawn by petitioner for the period in issue against domestic banks of itself attests to the frequency and continuity of petitioner's operations in the

United States. These operations attained the level of a trade or business under the rule of the cases just discussed.

The second precedent of this Court which seems to be favorably applicable to the contention of petitioner in the case at bar is *Lewenhaupt* v. *Com.* (CCA-9, 1955), 221 F. (2d) 227, a very recent case in which this Court affirmed *per curiam* in a short but here significant opinion the conclusion of the Tax Court below that plaintiff, a nonresident alien of Swedish nationality, had been engaged in trade or business in the United States in the year in issue (1946). This Court, referring to the findings and opinion of the Tax Court, said:

> " . . . . . The findings appear amply supported, and we are in agreement with the conclusions reached. The decision is accordingly affirmed for the reasons given by the Tax Court."

The Tax Court, in *Jan Casimir Lewenhaupt* (1953), 20 T.C. 151, had held that the taxpayer was engaged in trade or business in this country, not because of the sale by him of a tract of real property and the investment of part of the proceeds in securities, plus the ownership of additional securities, *but because of certain activities in real estate.*[7] The Tax Court said:

> " . . . . . the petitioner's activities during the taxable year connected with his ownership, and the management through a resident agent, of real property situated in the United States constituted engaging in a business. The petitioner prior to and during the taxable year, employed La Montagne as his resident agent, who, under a broad power of attorney which included

[7] In finding that there was a trade or business, the Tax Court apparently did not even find it necessary to apply in full Mr. Justice Holmes' rule of integration, which may not have been urged on it.

the power to buy, sell, lease, and mortgage real estate for and in the name of petitioner managed the petitioner's real properties and other financial affairs in this country. The petitioner, during all or a part of the taxable year, owned three parcels of improved, commercial real estate. The approximate aggregate fair market value of the three properties was $337,000. In addition, the petitioner purchased a residential property, and through his agent, La Montagne, acquired an option to purchase a fourth parcel of commercial property, herein referred to as the El Camino Real property, at a cost of $67,500. The option was exercised and title to the property conveyed to the petitioner in January, 1947.

"La Montagne's activities, during the taxable year, in the management and operation of petitioner's real properties including the following: executing leases and renting the properties, collecting the rents, keeping books of account, supervising any necessary repairs to the properties, paying taxes and mortgage interest, insuring the properties, executing an option to purchase the El Camino Real property, and executing the sale of the Modesto property. In addition, the agent conducted a regular correspondence with the petitioner's father in England who held a power of attorney from petitioner identical with that given to La Montagne: he submitted monthly reports to the petitioner's father; and he advised him of prospective and advantageous sale or purchases of property.

"The aforementioned activities, carried on in the petitioner's behalf by his agent, are beyond the scope of mere ownership of real property, or the receipt of income from real property. The activities were considerable, continuous, and regular, and, in our opinion,

constituted engaging in a business within the meaning of section 211(b)[8] of the Code. See *Pinchot* v. *Commissioner,* 113 F. 2d 718."

The parallel of the *Lewenhaupt* case to the case at bar is striking. In the latter, the activities carried on in the United States by petitioner's officers as its agents were "beyond the scope of mere ownership" of shares of stock, or "the receipt of income from" shares of stock.[9] The activities were "considerable, continuous, and regular", and therefore "constituted engaging in a business within the meaning of" section 231(b) of the Code.

It has been shown above that there were frequent negotiations by petitioner's president on American soil, to say nothing of those which he conducted abroad, looking toward the effecting of arrangements for the construction of recombined milk plants abroad, persons coming from foreign countries to see petitioner's president in the United States. If the plans entertained by petitioner had come to fruition, it would have been a principal financial participant in these operations. That they did not come to fruition was not because petitioner did not wish them so to do, but because the inconvertibility into dollars of the currencies of the various foreign countries in the premises during the years in issue as a consequence of World War II made the projects unfeasible from the standpoint of petitioner and the other entities which would have participated in the ventures, and who hoped to be able to reap their profits in a hard cur-

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[8] Sec. 211(b) was *in pari passu* with section 231(b), I.R.C. of 1939 the basic difference, apart from that of rates of tax being that the former related to alien individuals and the latter to foreign corporations.

[9] There is of course no essential difference in the determination of the question at issue between the "mere ownership" of real estate in the United States and the "mere ownership" of shares of domestic stock kept therein. The same thing is true of "the receipt of income from" the two classes of property.

rency. All this frequent activity on American soil when combined with the frequent correspondence with and trips to the head office of petitioner in Mexico constitutes the conduct of a trade or business in this country. The constant receipt of dividends in each of the three years by petitioner's statutory agent in the United States, their crediting to the account of plaintiff at one of its domestic banks in the aggregate of $1,867,385 for the period in issue, the drawing of 199 checks by petitioner in the period on American soil, the negotiations for loans and their obtention in large amounts, their repayments, and the purchases and resales of cans can all attest to continuous and significant activity.

That the cans were resold to a company controlled by petitioner's president is of no consequence, even on the assumption that although the president owned none of petitioner's stock yet petitioner and the buying company were somehow under *de facto* "common control." The propriety of such transactions, where they were fairly made, was recognized by clear implication in sec. 45, I.R.C. of 1939, by which the Commissioner was authorized to allocate income and deductions when necessary in order to prevent *evasion of taxes* or *clearly to reflect the income* of organizations under common control. Moreover, the legality of the transaction is not disputed and cannot be—See 13 Am. Jur. 954, sec. 1000, and 19 C.J.S. 166, sec. 789.

That the Tax Court should have regarded the sales of tin cans as real is attested by its own decision in *W. P. Hobby* (1943), 2 T.C. 980. In that case, the Commissioner urged that sales of shares of stock made by the petitioner therein should not be regarded as sales because they were made (in four instances) by petitioner when he knew that the shares were about to be redeemed at par by the corporation with the consequence that his gain on redemption

would have been assimilated to ordinary income (partial liquidation taxable as a short-term capital gain). In one instance, despite his knowledge, petitioner sold some of the shares to a friend at less than par, but at a gain to himself, and in the other three he sold them at par although knowing that the sale would enable the buyer instead of himself to receive an imminent dividend. The Tax Court, nevertheless, allowed petitioner to treat the sales as long-term capital gains. In rejecting the Commissioner's contention, the Tax Court said:

> "The Commissioner argues that petitioner did not in fact sell; or may not be regarded as having sold, the shares. He says that this is because the alleged sale 'had no business purpose'. What kind of 'business purpose' must be shown as necessary to the recognition of a sale is not made clear, and there is no statutory requirement to that effect. The question is not one of purpose, but whether the transactions were in fact what they appeared to be in form. *Chisholm* v. *Commissioner,* 79 Fed. (2d) 14. It is true that the sales were made at times when their effect would be to avoid the impact of the forthcoming redemption and the resulting tax. Petitioner, a shareholder, had an unrealized increment in his shares which he wanted to realize. Collaterally, he wanted to use a legitimate transaction which would impose upon him the least tax. This is not an interdicted purpose. The primary purpose to realize the gain was a legitimate business purpose, even though it also had a collateral favorable tax effect.
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> "Both intended that complete title and control should pass for a *fixed price,* — that for all purposes petitioner's ownership should end and the purchaser's

> begin with the transfer. . . . The petitioner's tax saving purpose did not invalidate the sale. Clearly the corporation could not have refused to recognize the purchaser as entitled to the redemption amount."

By comparison, it is clear that the sales of tin cans and of fat made by petitioner in the case at bar were *sales* within the Tax Court's own precedent, and when coupled with Mr. Justice Holmes' rule of integration and the varied activities of petitioner in the United States narrated above, they constituted the "engaging in trade or business in the United States".

Even if it be assumed, *arguendo*, that the taxpayer was formed in part to reduce taxes on United States income, or that it engaged in the purchase and sale of cans in order to do so, yet since the *ensemble* of its activities was a complex attracting the tag of "trade or business in the United States", *its tax reducing motive was immaterial.* This is shown in *Herbert* v. *Riddell* (DC SD, Cal., 1952), 103 F. Supp. 369.

The taxpayer had been organized under the laws of California for the purpose of producing, among other things, a motion picture from a play. The picture was produced under the taxpayer's direction, with a cast and director chosen by it, and it financed the production through a loan of $400,000.00 secured from a bank. It maintained an office, its acts were recorded, and it acted generally as a corporation, although its stock was closely owned either by another corporation or by a small group of individuals. In the language of Judge Yankwich of the District Court, the government attempted to "sublimate" certain facts and thereby induce the Court to wipe out recognition of the corporation as an entity, though the corporation in its production of the film paid out in checks more than $450,000.00, and paid Federal taxes, state taxes, and license

fees. In 1945, the year following its organization, the corporation was thrown into dissolution, and its stockholders claimed long-term capital gain treatment on their receipts in the dissolution, whereas the government denied that there was a corporate entity as a barrier to the creation of capital gains.

Judge Yankwich quoted extensively from *U.S.* v. *Chisholm* (1874) 17 Wall. 496, an old but leading decision of the Supreme Court in the tax field, his quotation being in part as follows:

> "It is said that the transaction proved . . . in this case, is a device to avoid the payment of a stamp duty, and that its operation is a fraud upon the revenue. To this objection there are two answers: 1st. That if the device is carried out by the means of legal forms, it is subject to no legal censure. To illustrate. The Stamp Act of 1862 imposed a duty of two cents upon a bank check when drawn for an amount not less than twenty dollars. A careful individual, having the amount of twenty dollars to pay, pays the same by handing to his creditor two checks of ten dollars each. He thus draws checks to the amount of twenty dollars, and yet pays no stamp duty. . . . While his operations deprive the government of the duties it might reasonably expect to receive, it is not perceived that the practice is open to the charge of fraud. He resorts to devices to avoid the payment of duties, but they are not illegal. . . . The device we are considering is of the same nature."

The District Court then declared that:

> "The principle has been reaffirmed repeatedly by the Supreme Court and by the Courts of Appeals,"

citing *Gregory* v. *Helvering* (1935) 293 U.S. 465, 469; *Superior Oil Co.* v. *Helvering* (1930) 280 U.S. 390, 395-396; *Commissioner* v. *Tower* (1946) 327 U.S. 280, 288; *U.S.* v. *Cumberland Public Service Co.* (1950), 338 U.S. 451, 455; *Howell Turpentine Co.* v. *Comm.* (1947), 5 Cir. 162 F. (2d) 319; *U.S.* v. *Cummins Distilleries Corporation* (1948) 6 Cir., 166 F. (2d) 17, 20-21.

With reference to the Supreme Court's decision in *Gregory* v. *Helvering, supra,* the District Court quoted the following from it:

> "The legal right of a taxpayer to decrease the amount of what otherwise would be his taxes, or altogether to avoid them by means which the law permits, cannot be doubted."

The District Court further said:

> "Despite the fact that in these cases, it is constantly urged that the motive to avoid taxation is important, the fact remains that, as Judge Learned Hand has stated, the Supreme Court
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> 'has never, so far as we can find, made that purpose the basis of liability' " (citing *Chisholm* v. *Commissioner,* (CCA-2, 1935) 79 F. (2d) 14).

Speaking of the domestic corporation involved in *Herbert* v. *Riddell, supra,* Judge Yankwich added:

> "So the Treasury Department is not . . . free to disregard the corporate entity where a tax benefit would result to the taxpayer. Conditions must exist which warrant the conclusion that a particular organization served *no actual business purpose* . . . "

Judge Yankwich quoted again from an opinion of the Court of Appeals for the Second Circuit:

> "The decisive question is whether the corporations were created to, or did, in fact, serve a recognizable business purpose . . ." (*O'Neill* v. *Com.* (CCA-2, 1948) 170 F. (2d) 596).

The business purpose of petitioner in the case at bar has been amply demonstrated in the record. It came into the jurisdiction through its agents (*Union Internationale, supra*) for the primary business purpose of negotiation of arrangements for the financing of recombined milk plants, which negotiations actually occurred, much of them on American soil. It negotiated for and borrowed money, it repaid loans, drew a multitude of checks, purchased and sold cans and milk fat, collected many dividends, sold securities, corresponded with the head office in Mexico and visited there. All these when added together constituted the fagot of the conduct of a trade or business. (*Edwards* v. *Chile Copper Co., supra*)

Again to quote a previous precedent of the Tax Court on the subject, it said in *John Junker Spencer* (1953), 19 T.C. 727:

> ". . . Thus when a corporate form for carrying on business is adopted and there follows an exercise of corporate powers and the doing of some business in the ordinary sense, regardless of *quantum,* the corporate entity constitutes a separate taxable entity and may not be disregarded. *Moline Properties Inc.* v. *Commissioner*, 319 U.S. 436. . ."

Under the facts shown in the case at bar, this quotation can be truthfully transposed to fit the case at bar as follows:

> ". . . Thus when a corporate form for carrying on business is adopted abroad and there follows the exercise of corporate powers and the doing of some business in the ordinary sense, regardless of *quantum,* the corporate entity constitutes a separate corporate entity taxable in the United States because of the doing of such business."

Among the cases cited by the Tax Court below in support of its decision was *Flint* v. *Stone Tracy* (1910), 220 U.S. 107, 171, holding that the word business means "busyness", and "implies that one is kept more or less busy, that the activity is an occupation". This is really in petitioner's favor. It has already been shown that there was a complex of activity by petitioner to be rolled into Mr. Justice Holmes' fagot, involving great "busyness" and an occupation when the numerous transactions already delineated are garnered into the sheaf. The corporations involved in the *Flint* case were all found to be doing business in the United States within the meaning of a Federal tax law, although one of them apparently merely owned and leased taxicabs and collected the rentals.

Snell v. *Com.* (CCA-5, 1938), 97 F. (2d) 891, simply says that the occasional sale of land held as an investment does not constitute engaging in the "business" of selling land so as to remove the parcels sold from the category of capital assets under the Revenue Acts of 1924 and 1926 in the alleged view that they were property held primarily for sale in the petitioner's trade or business. However, the Court of Appeals distinctly recognized that a taxpayer's "business" need not be his sole occupation, nor need it

take all his time, but that it may be seasonal and be carried on through agents whom the taxpayer supervises. The Court found that the taxpayer was engaged in business in another respect, in that he held considerable real estate through brokers, maintained an office for transactions connected with these activities and with the renting of buildings and the operation of a golf course, although he was usually absent from the State (Florida) during the dull season. This case seems to be wholly in favor of petitioner for reasons already advanced—the presence of petitioner's agents in the United States in the form of its officers (although subject to the supervision of the board of directors in Mexico, where petitioner was a serious, active, going concern), and the plenitude of petitioner's activities through these agents, particularly the president.

The Tax Court's quotations below from the decision in *Deering* v. *Blair.* (CCA, D.C., 1928), 23 F. (2d) 975:

> ". . . . . it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued, in order to bring it within the accepted definition of the word. . ."

is also in petitioner's favor. It has been shown, to say nothing of the very large volume of domestic dividends collected in this country, that petitioner expected from the outset during the period in issue to participate very profitably on an important scale in the operation of recombined milk plants; and the profits that it realized from sales of cans exceeded in amount the profits obtained by the taxpayers in the *Handfield* and *La Greide* cases, *supra*, both Tax Court decisions. The *Deering* opinion used the language quoted in a negative way because the case involved a horse farm operated as a hobby by one of the Vanderbilts with a long and unbroken string of losses for which a

"business" deduction had been claimed—an activity in no way similar to those of the petitioner in the case at bar.

Petitioner has no quarrel with the rule of *New Colonial Ice Co.* v. *Helvering* (1934), 292 U. S. 435, cited by the Tax Court below for the proposition that deductions and credits are a matter of legislative grace, but the very point of the present argument is that plaintiff, since it was *engaged in trade or business in the United States,* is entitled to the grace.

Linen Thread Co., Ltd., supra, cited by the Tax Court below, to support the proposition that "only items accounting for a fraction of one per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business" (in flat defiance of Mr. Justice Holmes' rule of integration), concerned the allegation of a Scottish corporation that it was engaged in trade or business in the United States in 1943 and 1944. The Company claimed a resident status for 1943 on the basis of two transactions and for 1944 on the basis of a mere unexecuted intention. Both the 1943 transactions were arranged by petitioner to be done in a way other than its usual way of shipping goods directly from Scotland. The first transaction consisted of a sale of crochet thread for $129.54, which was shipped to petitioner's New York office, from which the thread was delivered in the United States against the buyer's check. Petitioner's New York office was then billed from Scotland by one of petitioner's manufacturing subsidiaries there. The New York office did not solicit the sale, but was apprised of it by letter from its head office in Scotland. The second transaction consisted of a shipment from petitioner's office in Scotland to petitioner's wholly-owned subsidiary in New Jersey. Petitioner's agent in New York did not solicit the sale and did not handle the goods, but did only

the "paper work" on the transaction, which involved $600 odd, with a reported profit in the two sales of $151.58. The Tax Court found that:

> "Moreover, even if we were to assume that petitioner had a business purpose in involving its American office in these two sales, it would still be our conclusion that these two isolated transactions, profits from which constituted such a minute part of petitioner's total income from American sources in 1943, did not constitute engaging in trade or business in the United States within the meaning of section 231(a) of the Code. The test is both a quantitative and a qualitative one. *Scottish American Investment Co., Ltd., supra.*[10] The phrases 'engaged in business', 'carrying

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[10] *Scottish American Investment Co., Ltd.*, (1949) 12 T.C. 49, was decided by a badly divided Tax Court, six judges joining in a dissenting opinion delivered by Judge Opper, who thought that the foreign corporation there involved was engaged in trade or business in the United States; strangely enough, the same judge reached a contrary conclusion below in the case at bar. In his dissenting opinion in the *Scottish American* case, he said the following, with an apt quotation from the Supreme Court:

> "It seems to me impossible to reach the conclusion here enunciated and at the same time to give effect to the decision by the Supreme Court in *Commissioner* v. *Scottish American Investment Co.*, 323 U. S. 119. The following language does not strike me as dictum, but was the reasoning by which the Court arrived at its determination on the only issue it was there called upon to consider:
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> "'. . . While decisions as to the purchase and sale of American securities were made in the Edinburgh offices, there was abundant evidence that the American office performed vital functions in the taxpayers' investment trust business. The uncontradicted evidence showed that this office collected dividends from the vast holdings of American securities and did countless other tasks *essential to the proper maintenance of a large investment portfolio.* We cannot say that it was unreasonable for the Tax Court to conclude that this office . . . *was used for the regular transaction of business.* . . .'
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> "The present facts as well as the present taxpayer were identical with those with which the Supreme Court was there dealing. If

on business', and 'doing business' were defined in *Lewellyn* v. *Pittsburgh, B. & L.E.R. Co.,* (CCA, 3d Cir., 1915), 222 Fed. 177. It was stated therein, p. 185: ' "The three expressions, either separately, or connectedly, convey the idea of progression, continuity, or sustained activity. . . ." ' "

If one erroneously considers in isolation only the stick of sales of tin cans in the case at bar in matching petitioner's activities against the legal test, nevertheless it has already been shown above that these sales were 91 in number, not *2,* and that profits of several thousand dollars were made thereon, apart from the large amounts of dividends received and the repetitive negotiations for recombined milk operations, plus the numerous other activities of petitioner set forth.

Thacher v. *Lowe* (DC SD, N.Y., 1922) 288 F. 994, a District Court decision of early income tax days, is cited by the Tax Court below for its point that in the case at bar the character of the transactions "was such that they cannot be regarded as business transactions . . . because of their obvious lack of business purpose." This case again involved a hobby farm, like *Deering* v. *Blair, supra,* involving the Vanderbilt hobby farm, and the expenses of the hobby farm, run by a lawyer as an adjunct to his country place, were over $16,000 a year as compared to income of

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petitioner transacted business in an office within the United States as the prior proceeding held and as the unmistakable language of the Supreme Court concluded, I fail to see how it is possible that it was not then and is not here transacting business within the United States. . . ."

(Emphasis in original.)

It is to be observed that the fact that the taxpayer in the *Scottish American* case was British and that Wenner-Gren in the case at bar has a Swedish background should, of course, make no difference in respect of the applicable law.

$1,100 and $1,600 respectively for the years considered. Neither hobby farm case offers any parallel to the case at bar.

Both *W. P. Hobby* (1943) 2 T.C. 980 and *John Junker Spencer, supra,* alleged by the Court below to be inapplicable, have been shown to be favorable to petitioner's contention of doing business under the fagot theory, and *Clara M. Tully Trust* (1943) 1 T.C. 611, likewise so alleged, is a similar case to the other two and susceptible of the same analysis. *Lewenhaupt, supra,* cited by the Court below for the meaning of "engaged in business", has also been shown above to be favorable to petitioner. *Marian Bourne Elbert* (1941) 45 B.T.A. 685, merely found that petitioner, describing herself as "an old-fashioned wife", was not engaged in business because she "looked after" her investments, on the authority of *Higgins* v. *Com.* (1941) 312 U.S. 212 and *U.S.* v. *Pyne* (1941) 313 U.S. 127. In the *Higgins* case, ". . . the petitioner merely kept records and collected interest and dividends from his securities, through managerial attention for his investments," living abroad in Paris. In the *Pyne* case, there was merely the administration of a large estate, with the executors "conserving" the estate and protecting its income through various transactions.

Gregory v. *Helvering, supra,* cited by the Court below for the absence of a "business purpose", involved the special "business purpose" doctrine judicially evolved in respect of corporate reorganizations and concerned a corporation brought into being as a "contrivance to trump up a "reorganization", which performed a transitory and "limited function". The Supreme Court said: "When that limited function had been exercised, it immediately was put to death." There is clearly here no parallel to the continued existence and the continued opera-

tions in the United States of the petitioner in the case at bar.

The *Ehrman* and *Snell* cases, discussed *supra,* are mentioned by the court below as showing the rule requiring "a fair degree of activity, scope and continuity in the transactions undertaken." It has been shown above how those cases in reality support the present petitioner's position.

Finally, the fact that petitioner described its principal activity as "investment" on its tax returns is of no consequence under the fagot theory explained above.

Petitioner may summarize its contentions under this subargument as follows: Petitioner agrees with the Court below that the test of "being engaged in a trade or business" requires a certain amount of activity and, moreover, agrees that there should be some profit in prospect. In addition, petitioner concedes that rather than isolated and non-continuous actions there must be some continuity and scope of action.

But unlike the Court below, petitioner vehemently asserts that the degree of activity engaged in by it during the taxable years was more than enough to constitute a trade or business. The Court's reliance below upon the fact that some transactions unfortunately resulted in either nominal profits or losses is erroneous under the Tax Court's own decisions and petitioner's analysis above.

Perhaps the most significant and fundamental error committed by the Tax Court was its transparent refusal to regard the entirety of petitioner's transactions in the resolution of the question. For example, it simply did not place any weight upon the bank negotiations, dividend collections and other financial matters which left, on the basis of the record, only the tin can transactions. These the Court simply wrote off; while "substantive" they should be

disregarded in the determination of the issue. This, petitioner submits, is clearly error.

There is also difficulty with the Tax Court's first basis for its holding, namely, "the business purpose test." Having erroneously concluded that petitioner admittedly was engaged in the business of trying to save taxes, an absurdity in itself, it failed to recognize that that purpose has been rejected by all Courts as a bar in this type of situation involving the degree of activity here present.

Finally, it may be observed that many of the cases cited by the Court below are simply inapposite. For these reasons, petitioner submits that the Tax Court erred by not holding that it was engaged in a trade or business within the meaning of Section 231(b) of the Internal Revenue Code.

B. *The Tax Court's Decision was based in significant part upon purported facts which were clearly erroneous.*

Petitioner proposes to demonstrate that certain of the Tax Court's significant findings of fact were clearly erroneous; either they were not supported by substantial evidence or they were actually contrary to the evidence.

Over and above the additional indications of petitioner's United States business activity referred to in Argument II (which were not presented to the Tax Court below and are not considered here) the Tax Court simply ignored certain uncontroverted testimony in making adverse findings of fact.

Illustrative of this type of error is the finding (R. 46) that, "Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose."

Petitioner is unable to find support for the quoted sentence anywhere in the Record. To the contrary, the testimony of Turnbow which was not contradicted was that he devoted considerable time during the three taxable years in an effort to establish projects for the construction and operation of recombined milk plants. Assets of petitioner were used for this purpose. See Turnbow's testimony at R. 189-195.

Moreover, this finding is not an evidentiary fact. It is an ultimate fact or conclusion and, as such, need not be judged by the standard of "clearly erroneous". In such circumstances it is sufficient simply to demonstrate that the ultimate conclusion is not supported by any of the evidentiary facts.

Throughout the Record there appears to be a rather cavalier disregard of the distinction between petitioner as a corporation and Wenner-Gren as an individual. This is particularly true in connection with the original capital invested in petitioner and also with respect to various bank loans and the use of the proceeds thereof. The Court initially makes the incredible and wholly unsupported finding that petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over one billion dollars (R. 45).

Aside from the fact that this finding is almost prejudicial, it is in part based upon admitted hearsay (see R. 221). Moreover, the finding is ambiguous in that it does not make clear whether or not Wenner-Gren is a stockholder of petitioner or whether Wenner-Gren's relationship was more remote.[11] Despite this inexactitude with respect to

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[11] See comment with respect to stock ownership of petitioner in Statement of Facts, *supra*.

a matter the Tax Court apparently regarded as significant, the Court below in a number of instances made findings with respect to Wenner-Gren which obviously should have related to petitioner. And this is done without any support from the Record at all.

For example, the Court found that "The funds borrowed by petitioner were in the main used by Wenner-Gren." (R. 49). This ultimate or conclusory fact is not supported by any of the evidentiary facts which petitioner has been able to discover in the Record. The only pertinent evidence in this respect seems to support the premise, as stipulated, that petitioner used the funds. (See R. 26-34)

Again, on page 48 of the Record, the Court found that, "In May it [petitioner] borrowed $1,000,000 from Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies." Petitioner is unable to find any support for this finding in the stipulation or the testimony.

In the same paragraph of the findings the Court below also found that, "On August 6, it (petitioner) borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the Bank, which petitioner had assumed." The reference in this finding to the "prior indebtedness of Wenner-Gren" is entirely gratuitous and tends to give an erroneous impression. Shortly after petitioner was incorporated in 1947, Wenner-Gren had transferred title to sizable blocks of Servel and Electrolux stocks to petitioner in exchange for petitioner's shares. At the time of the transfer the Servel and Electrolux blocks of stock were hypothecated to a bank to secure a loan. As part of the consideration for the title to the stock, petitioner not only issued its own shares to Wenner-Gren but also assumed his liability to the bank for which the shares had been pledged. At the time of the repayment described in the sentence under con-

sideration, the indebtedness was no longer that of Wenner-Gren but that of petitioner and hence any reference to the fact that it was a prior indebtedness of Wenner-Gren is legally of no importance, but perhaps indicative of the Tax Court's attitude where Wenner-Gren semed to be on trial. In passing, it is the understanding of counsel that after Wenner-Gren received petitioner's shares they were almost immediately transferred to another corporation in exchange for its shares. However, this information does not appear in the Record in this case although it should have appeared. Apparently, the Tax Court regarded the stock ownership in petitioner as of some significance and has ambiguously straddled the problem by finding (R. 45) that petitioner "represented" the incorporation of part of the vast holdings of Axel Wenner-Gren, whatever "represented" may mean.

On page 50 of the Record the Court found that, "In December, 1948, petitioner undertook to place with Western, *in its own name,* an order covering precisely the same type of cans, etc." The unnecessary phrase, "in its own name" suggests some distinction with an order placed by petitioner in somebody else's name. There seems to be no basis for such distinction in the Record and this peculiar emphasis may be simply preparation for the later refusal of the Tax Court to recognize a business purpose in the can transactions of petitioner, even though it was held that they were "substantive".

The Court below also found that petitioner never used the Oakland address on its letterheads or otherwise and paid no rent for the Oakland office, and in the same vein it also found that from 1948 through 1950 petitioner had no paid employees in the United States. (R.45-46). These findings disregard the testimony of Turnbow to the effect that he held conferences with foreign interests regarding

erection of recombined milk plants abroad at the Oakland office. This would certainly constitute use of the Oakland address "otherwise". (See R. 120-123 and 192-193)

The fact that petitioner paid no rent for the Oakland office would appear to be of no significance. The fact is that undoubtedly some of the office overhead would be chargeable to petitioner due to the time and activities of both Turnbow and his secretary. Incidentally, Exhibit XXXI attached to the stipulation of facts contains a not insignificant tabulation of office and miscellaneous expenses, among which may be identified items such as postage, insurance, telephone and telegraph, legal expenses, printing and photostating, as well as travel. With respect to the "no paid employees" the Court simply refused to accept the fact that Turnbow was paid $1,500 per month during the last six months of 1950 by petitioner as salary.

The Tax Court did not specifically advert to the fact that, in addition to the official, paid resident agent in Reno, Nevada, petitioner had three officers resident in the United States during the taxable years. These include Turnbow, petitioner's president, M. W. Dobrzensky, vice-president (R. 44) and Franklin A. Schulze, secretary-treasurer. (See petitioner's tax returns placed in evidence through supplemental stipulation of facts, R. 40, 179).

In conclusion, it is asserted that the Tax Court's findings of fact were in part inaccurate, incomplete and not based upon substantial evidence. In the Statement, *supra,* petitioner has deleted those findings of the Tax Court which it believes to be clearly in error and has modified or corrected other findings as indicated there. Some of the facts thus modified, corrected or deleted represent conclusory facts rather than evidentiary facts, while some are evidentiary facts themselves. As to the latter, petitioner submits that where challenged they are clearly erroneous as discussed above.

ARGUMENT II

The Tax Court Improperly Refused to Relieve Petitioner of Its Judgment and, Therefore, the Case Should Be Remanded for Further Proceedings.

This argument relates to the Tax Court's discretion. It refused to relieve petitioner of its judgment on the grounds of mistake, inadvertence, newly discovered evidence or any other ground. If this Court should decide this argument for petitioner, the case should be remanded to the Tax Court to take further testimony with respect to the trade or business activities of petitioner in the United States during the taxable years and the first question need not be answered at this time.

The decision of the Tax Court was filed on September 4, 1957. Petitioner retained new counsel to prosecute an appeal to this Court on October 21, 1957. In the course of the examination of the record below and files relating to petitioner's suit in the Tax Court, new counsel became convinced that neither a complete nor entirely accurate presentation of facts had been made below.

The principal issue below turned upon the scope of petitioner's activity in the United States. Inexplicably, there were omitted from the record at least eight pertinent United States activities of petitioner in the taxable years carried on through its officers or agents.

It also appears that Axel Wenner-Gren, the principal at interest, had not been advised of the trial in the Tax Court nor had he been invited to be a witness therein. Significantly, the principal witness on behalf of the petitioner was Grover Turnbow, petitioner's former president, who had fallen out with Wenner-Gren and had settled that dispute in 1950 upon receipt of $105,000.00 in cash and securities from Wenner-Gren. (R. 46) One of the counsel in

the Tax Court proceeding had been a vice-president of petitioner as well as its attorney. (R. 44) It also appears that some of the transactions which could have been testified to, but were not mentioned at the trial, were well known to Grover Turnbow and in fact, had been participated in by Turnbow himself.

To cap the climax, it appears that there was a misunderstanding between petitioner's counsel and the Judge of the Tax Court to the point that the Tax Court Judge believed that the petitioner had admitted that its conduct was not motivated by business objectives but purely by a desire to save taxes. (R. 54) Strangely enough, petitioner's counsel had specifically disavowed any such position in its opening statement (R. 102) but upon brief took a position that cast doubt upon this proposition (Petitioner's Opening Brief, p. 34-5.) In any event, the Judge of the Tax Court regarded the tax avoidance motive as one of the two significant factors in deciding the case. If petitioner's counsel below really intended to make the admission it was tantamount to conceding the issue (even if inadvertently) in the view of the Tax Court Judge.

Against this background, petitioner's new counsel filed a motion on November 19, 1957 for leave to file a motion to vacate decision, to reopen the proceeding, and to take further testimony. Supporting affidavits accompanied the motion. The motion for leave to file was placed on the Tax Court motion calendar and was argued in Washington, D. C. on November 27, 1957, one week prior to the expiration of the appeal period. At the motion argument respondent's counsel opposed the motion which was denied by the Court. Thereupon this appeal was filed.

At the motion argument, petitioner's counsel offered to place on the stand two persons then in the courtroom (Messrs. O'Connell and Grenninger) who were officers

and directors of petitioner during the taxable years, with personal knowledge of its United States activities. Neither had testified at the Tax Court trial. Respondent objected and the Court sustained the objection, refusing to hear any testimony, upon which petitioner's new counsel made an offer of proof (R. 271-281).

Among the matters thus offered were the following:

1) In 1949 a race track in Mexico City known as The Hippodrome was owned and operated by petitioner. During 1949, Turnbow conducted extensive negotiations in the United States in an attempt to sell the controlling interest in that race track. A sale was not consummated as a result of these negotiations, although time and activity were involved.

2) Also during 1949, Turnbow and others negotiated to sell in the United States a subsidiary of petitioner. The subsidiary was The Bank Continental. Negotiations were conducted in New York City by an officer of petitioner for this purpose.

3) In 1949, a concern known as Pan-American Trust Company, beneficially owned or controlled by petitioner, was sought to be sold in New York City and in this connection negotiations again were conducted with New York banks.

4) Also in 1949, Turnbow conducted negotiations with Tidewater Oil Company in the United States in an attempt to get them to enter the oil business in Mexico under the auspices of petitioner.

5) During the same year Turnbow tried to interest petitioner in buying the stock of the Golden State Dairy in California. That dairy is now merged into Foremost Dairies, of which Turnbow is now president. It is one of the largest milk combines in the world.

6) In 1948, petitioner loaned more than $600,000.00 to two of its subsidiaries in Mexico to permit them to purchase dehydrated milk powder in carload quantities in the United States.

7) In 1948, negotiations were conducted in New York City with a factor in an attempt to obtain a loan of $350,000.00 in connection with milk operations of petitioner in Mexico.

8) During 1948, 1949 and 1950 continuous negotiations were under way, conducted in greater part by Wenner-Gren, in an attempt to merge the two largest telephone companies in Mexico into one concern. One of these companies was a subsidiary of a United States company, The International Telephone and Telegraph Company. Over a period of three years and under specific authorization by the Minutes of petitioner, Wenner-Gren negotiated in New York and finally, acquisitions were made by petitioner in 1950 and mergers were consummated. Wenner-Gren visited the United States on several occasions and negotiated extensively with the parent corporation in the United States.

Nothing in the Tax Court record indicates the general purposes of the formation of petitioner and the world wide nature of its activities as originally envisaged. Available evidence was not introduced to show that it was intended primarily to engage in the dehydrating of milk products to be purchased principally in the United States and then recombined to form whole milk in various portions of the world. All of this was to be carried on under the auspices of the United Nations.

The record is bare of any reference to the over-supply of milk in the United States during the taxable years and the resulting give-away programs followed by this government which nullified the original plans of petitioner and resulted in it diversifying its activities. No use was made

at the Tax Court trial of corporate minute books, account books, or other available records including stock record books, and as a result data conventionally found in such sources is lacking in this case. More significant, the only petitioner witnesses used at the trial were Grover Turnbow, who by that time had severed his connection with the petitioner and was apparently inclined to be hostile to Wenner-Gren, and Marian Palmer, Turnbow's personal secretary. No testimony was offered by informed persons such as Axel Wenner-Gren, Birger Strid, O'Connell, and Grenninger. Finally, no systematic attempt was made to relate various disbursements and deposits reflected in the checking accounts with otherwise significant transactions.

The impression is unavoidable that an incomplete presentation of facts was made to the Tax Court, and that, moreover, some of the facts were inadequately if not inaccurately presented. Unfortunately, all of these derelictions go to the question of the scope of activity engaged in by petitioner during the taxable years in the United States. It is against this background that the argument is raised here that the Tax Court erred by failing to relieve the petitioner of the Court's judgment and reopen the proceeding to take *all* of the available and pertinent testimony.

The first question which arises is, under what circumstances will the Tax Court vacate a decision and grant a new trial. Tax Court Rule 19 relating to motions is purely mechanical and is no aid in determining the standards to be applied. Petitioner has been unable to identify any significant standards in decided cases. In view of the fact that what is involved here is evidence, reference is made to Tax Court Rule 31 relating to evidence.

In subparagraph (a) of that Rule it is stated that trials before the Tax Court will be conducted in accordance with the rules of evidence applicable in trials without a jury in the United States District Court for the District of Columbia. The second sentence of this same subsection refers the reader to Rule (43b) of the Rules of Civil Procedure in the case of unwilling or hostile witnesses in Tax Court trials. The fact that the Tax Court rule of evidence is based upon that applicable in non-jury trials in the District Court of the District of Columbia echoes Section 7453 of the 1954 Internal Revenue Code. The rules of evidence applicable under such circumstances are the *Rules of Civil Procedure* for the United States District Courts. It may be observed in passing that this reference to the *Rules of Civil Procedure* is regarded by the leading text writer in Federal tax matters (Mertens Code Commentary, *Law of Federal Income Taxation,* Sec. 7453:1) as a *modification* of the rule contained in prior law.

Under the 1939 Code rules of evidence applicable by reference were those within the jurisdiction of the Courts of equity of the District of Columbia.

Turning to the *Rules of Civil Procedure,* helpful and controlling precepts are found in Rule 60, "Relief From Judgment or Order". Subparagraph (b) thereof describes the circumstances under which a court may relieve a party from a final judgment. Among the circumstances there mentioned are mistake, inadvertence, excusable neglect, newly discovered evidence, or any other reason justifying relief from operation of the judgment.

It has been pointed out that "concession" by petitioner's counsel in the Court below that petitioner had no business purpose but only a desire to save taxes when it engaged in business in the United States was tantamount to defaulting on the major issue below. (R.54) In *Elias* v. *Pitucci* (DC

ED Pa., 1952) 13 F.R.D. 13, it was held that a default would be set aside where it was caused by a mistake of prior counsel in believing that an answer was not required to be filed and present counsel, upon learing of that mistake, had acted promptly and defendant had a meritorious defense.

Again assimilating the apparent concession by petitioner's prior counsel in the Court below to a default, a somewhat analagous case is found in *Tozer* v. *Charles A. Krause Milling Co.,* (CCA-3, 1951) 189 F. (2) 242. In that case the Third Circuit, discussing Rule 60(b) of the *Rules of Civil Procedure,* held that it should receive a liberal construction. Moreover, matters involving large sums of money should not be determined by default judgments if that could reasonably be avoided. Any doubt should be resolved in favor of the moving party under the rule to set aside the judgment so that the case could be decided on the merits. In that case a default judgment had been entered in a Federal Court in Pennsylvania against the defendant, a foreign corporation which had not given proper notice of address for service of process to the Secretary of the Commonwealth. The defendant in its motion showed a defense which, if proved, would defeat the claim. The District Court was held to have abused its discretion in refusing to vacate the default judgment.

Whether, under the facts as set forth above, it may be held that there was in this case mistake, inadvertence, newly discovered evidence, or "any other reason justifying relief" is for this Court to decide. The evidence sought to be presented to the Court was not merely cumulative and had a direct and material bearing upon the basic issue presented. There is a reasonable basis for believing that, had the additional testimony been available to the Court below, that Court would have reached an opposite result. It would

be unjust to have this matter disposed of adversely without full consideration of all available evidence. This Court's statutory mandate and power to decide cases "as justice may require" is adequate assurance of an ultimate result which is fair. Petitioner simply cannot avoid the conclusion that the Court below reached a wrong conclusion based upon incomplete and partially inaccurate facts. For these reasons it is concluded that the Court below abused its discretion by denying petitioner's motion for relief from judgment. This cause should, therefore, be remanded for further proceedings on the merit issue (Argument I).

ARGUMENT III

Petitioner Is Entitled to Deduct Interest, Expenses and Losses on Sale of Property in the Taxable Years.

The Court below regarded this question as a subordinate issue, to be reached only if petitioner prevailed on the argument relating to trade or business within the United States. Because the Court below held that petitioner was not engaged in such trade or business, it neither reached nor decided this question.

This Argument is designed to protect petitioner's rights to assert seasonably its contentions with respect to interest, expenses and losses. Because the Court below did not decide anything with respect to this issue nothing can be urged before this Court. Petitioner regards this issue as parallel to the trade or business issue and concedes that it should be disposed of on the same basis as the trade or business issue. That is, if petitioner was engaged in trade or business it is entitled to deduct the interest, expenses and losses connected with income from sources within the United States. Otherwise it should lose this issue. Thus, if petitioner should prevail on Argument I it should prevail here. Should this case be remanded for reconsideration of Question I relating to trade or business activities, then petitioner would wish to submit this question. This argument is, therefore, intended to show that this issue is neither abandoned nor conceded by petitioner.

Conclusion

Petitioner concludes and requests this Court to hold that:

(a) Petitioner should be sustained on Argument I and, therefore, the holding of the Tax Court should be reversed

and petitioner should also be sustained on Argument III; or

(b) the case should be remanded to the Tax Court for further proceedings on Arguments I and III; or

(c) petitioner should be sustained on Argument II and the case remanded for further proceedings on Arguments I and III.

Respectfully submitted,

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"APPENDIX"

APPENDIX A

Statutes and Regulations

STATUTES

INTERNAL REVENUE CODE OF 1939

SECTION 13. TAX ON CORPORATIONS IN GENERAL.

(a) DEFINITIONS.—For the purposes of this chapter——

* * * * *

(2) Normal-Tax Net Income.—The term "normal tax net income" means the adjusted net income minus the credit for dividends received provided in section 26(b).

SEC. 14. TAX ON SPECIAL CLASSES OF CORPORATIONS.

* * * * *

(c) FOREIGN CORPORATIONS.

(1) In the case of a foreign corporation engaged in trade or business within the United States, the tax shall be an amount equal to 24 per centum of the normal-tax net income regardless of the amount thereof.

(2) In the case of a foreign corporation not engaged in trade or business within the United States, the tax shall be as provided in section 231(a).

SEC. 15. SURTAX ON CORPORATIONS [Effective 1948 and 1949]

(a) Corporation Surtax Net Income.—For the purposes of this chapter, the term 'corporation surtax net income' means the net income minus the credit for dividends received provided in section 26(b) . . .

(b) Imposition of Tax.—There shall be levied, collected and paid for each taxable year upon the corporation surtax net income of every corporation (except . . . a corporation subject to a tax imposed by section 231(a) . . .) a surtax as follows:

(1) Surtax net incomes not over $25,000.—Upon corporation surtax net incomes not over $25,000, 6 per centum of the amount thereof.

(2) Surtax net incomes over $25,000 but not over $50,000.—Upon corporation surtax net incomes over $25,000, but not over $50,000, $1,500 plus 22 per centum of the amount of the corporation surtax net income over $25,000.

(3) Surtax net incomes over $50,000.—Upon corporation surtax net incomes over $50,000, 14 per centum of the corporation surtax net income.

"Sec. 15. Surtax on Corporations. [Effective 1950]

"(a) Corporation Surtax Net Income.—For the purposes of this chapter——

(1) Calendar year 1950 . . . —In the case of a taxable year beginning on January 1, 1950, and ending on December 31, 1950, . . . the term 'corporation surtax net income' means the net income minus the sum of the following credits:

(A) The credit for dividends received provided in section 26(b):

* * * * *

"(b) Imposition of Tax.——

* * * * *

(2) Calendar year 1950.—In the case of a taxable year beginning on January 1, 1950, and ending on

December 31, 1950, there shall be levied, collected, and paid for such taxable year upon the corporation surtax net income of every corporation (except a corporation subject to a tax imposed by section 231(a) . . .) a surtax determined by computing a tentative surtax of 19 per centum of the amount of the corporation surtax net income in excess of $25,000, and by reducing such tentative surtax by an amount equal to 1 per centum of the lower of (A) the amount of the credit provided in section 26(a), or (B) the amount by which the corporation surtax net income exceeds $25,000.

* * * * *

"SEC. 26. CREDITS OF CORPORATIONS.

"In the case of a corporation the following credits shall be allowed to the extent provided in the various sections imposing tax——

* * * * *

(b) DIVIDENDS RECEIVED.—An amount equal to the sum of——

(1) In general.—85 per centum of the amount received as dividends . . . . . from a domestic corporation which is subject to taxation under this chapter; . . . . . "

SEC. 231. TAX ON FOREIGN CORPORATIONS

(a) NONRESIDENT CORPORATIONS

(1) IMPOSITION OF TAX.—There shall be levied, collected, and paid for each taxable year, in lieu of the tax imposed by sections 13 and 14, upon the amount received by every foreign corporation not engaged in trade or business within the United States, from

sources within the United States, as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable annual or periodical gains, profits, and income, a tax of 30 per centum of such amount, except that in the case of corporations organized under the laws of any country in North, Central, or South America, or in the West Indies, or of Newfoundland such rate with respect to dividends shall be reduced to such rate (not less than 5 per centum) as may be provided by treaty with such country.

* * * * *

(b) Resident Corporations.—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 14(c)(1) and section 15.

Swedish-United States Income Tax Convention

* * * * *

Article VII

1. Dividends shall be taxable only in the contracting State in which the shareholder is resident or, if the shareholder is a corporation or other entity, in the contracting State in which such corporation or other entity is created or organized; provided, however, that each contracting State reserves the right to collect and retain (subject to applicable provisions of its revenue laws) the taxes which, under its revenue laws, are deductible at the source, but not in excess of 10 per centum of the amount of such dividends. . . . ."

Protocol

* * * * *

3. A citizen of one of the contracting States not residing in either shall be deemed, for the purpose of this Convention, to be a resident of the contracting State of which he is a citizen.''

REGULATIONS

REGULATIONS 111—INCOME TAX

SEC. 29.231–1 TAXATION OF FOREIGN CORPORATIONS.—

For the purposes of this section and sections 29.231–1, 29.232–1, 29.235–1, 29.235–2, and 29.236–1, foreign corporations are divided into two classes: (a) foreign corporations not engaged in trade or business within the United States at any time within the taxable year, referred to in the regulations as nonresident foreign corporations (see section 29.3797–8); and (b) foreign corporations which at any time within the taxable year are engaged in trade or business within the United States, referred to in the regulations as resident foreign corporations (see section 29.3797–8).

(a) Nonresident foreign corporations.—A nonresident foreign corporation is liable to the tax upon the amount received from sources within the United States, determined under the provisions of section 119, which is fixed or determinable annual or periodical gains, profits, and income. For the purposes of section 231(a), the term "amount received" means "gross income." Specific items of fixed or determinable annual or periodical income are enumerated in the Internal Revenue Code as interest (except interest on deposits with persons carrying on the banking business), dividends, rents, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, but other fixed or determinable annual or periodical gains, profits, and income are also subject to the tax, as, for instance, royalties. As to the definition of fixed or determinable annual or periodical income, see section 29.143–2.

* * * * *

The fixed or determinable annual or periodical income from sources within the United States including royalties, of a nonresident foreign corporation is taxable at the rate of 30 percent (27½ percent as to such income received prior to October 31, 1942). In the case of dividends received by a nonresident foreign corporation organized under the laws of any country in North, Central, or South America, or in the West Indies, or of Newfoundland, the rate shall be reduced to such rate (not less than 5 percent) as may be provided by treaty with such country.

(b) Resident foreign corporations.—A resident foreign corporation is not taxable upon the items of fixed or determinable annual or periodical income enumerated in section 231(a) at the rate specified in that section. A resident foreign corporation is, under section 14(c)(1), liable to a tax of 24 percent of its *normal tax* net income (regardless of the amount thereof), that is, its net income from sources within the United States (gross income from sources within the United States minus the statutory deductions provided in sections 23 and 232) less the credits allowed against net income by section 26(a) and (b). A resident foreign corporation is also liable to the corporation surtax at the following rates:

(1) Upon corporation surtax net incomes of $25,000 or less, 10 percent of the amount thereof.

(2) Upon corporation surtax net incomes over $25,000 but not over $50,000, $2,500, plus 22 percent of the amount of such income in excess of $25,000.

(3) Upon corporation surtax net incomes of more than $50,000, 16 percent of the entire amount thereof.

The corporation surtax net income of a resident foreign corporation is its net income from sources within the United States less the credit allowed by section 26(b), which credit

is limited in amount to 85 percent of its net income from sources within the United States.

As used in sections 119, 143, 144, 211, and 231, the phrase "engaged in trade or business within the United States" includes the performance of personal services within the United States at any time within the taxable year. Such phrase does not include the effecting of transactions in the United States in stocks, securities, or commodities (including hedging transactions (through a resident broker, commission agent, or custodian. The term "commodities" as used in section 211(b) means only goods of a kind customarily dealt in on an organized commodity exchange, such as a grain futures or a cotton futures market, and does not include merchandise in the ordinary channels of commerce.

APPENDIX B

EXHIBITS *

Description	Identified	Offered	Received
1 through 31 (attached to Stipulation of Facts) ..	92	92	92
A, B, C (attached to Supplemental stipulation of Facts)	93	93	93
32	124	125	125-6
33	132	138-9	139
34	132-3	133	138
35	139-40	140	142
36	146-7	147	149
D	227-8	229	229
E	241-2	241	242-3

* In accordance with Rule 18, Subdivision 2(f).

No. 15912

United States
Court of Appeals
for the Ninth Circuit

CONTINENTAL TRADING, INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record

Petition to Review a Decision of The Tax Court of the United States.

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—4-25-58

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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The Tax Court of the United States

Docket No. 55212

CONTINENTAL TRADING, INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1954

Nov. 4—Petition received and filed. Taxpayer notified. Fee Paid.

Nov. 5—Copy of petition served on General Counsel.

Dec. 21—Answer filed by General Counsel.

Dec. 21—Request for hearing in San Francisco, Calif. filed by General Counsel.

Dec. 30—Notice issued placing proceeding on San Francisco, Calif. calendar. Service of Answer and Request made.

1956

July 20—Hearing set 8/27/56, San Francisco, Calif.

1956

Aug. 27—Hearing had before Judge Opper on merits, Stipulation of facts with Ex. I thru XXX-I, Supplemental Stipulation of Facts with Exhibits A, B & C, Second Supplemental Stipulation of Facts filed 8/31/56, filed at hearing. Briefs due 11/30/56; Replies due 12/31/56.

Sep. 17—Transcript of Hearing 8/30/56 filed.

Sep. 17—Transcript of Hearing 8/31/56 filed.

Nov. 30—Brief filed by Petitioner. 12/21/56 served.

Nov. 30—Motion to extend time to 12/20/56 to file brief, filed by Respondent. 12/4/56—Granted. Served 12/5/56.

Dec. 3—Proof of service of Petitioner's opening Brief filed.

Dec. 20—Brief filed by Respondent. 12/21/56 Served.

1957

Jan. 23—Reply Brief filed by Petitioner. Served 1/24/57. (Served late 3/11/57.)

Aug. 30—Memorandum findings of fact and opinion rendered. Judge Opper. Decision will be entered for the Respondent. Served 9/3/57.

Sep. 4—Decision entered, Judge Opper, Div. 14. Served 9/6/57.

Sep. 24—Motion by petitioner to vacate decision. 10/1/57—Denied. Served 10/1/57.

Sep. 24—Motion by petitioner for reconsideration. 10/1/57—Denied. Served 10/1/57.

Nov. 8—Entry of appearance of Fred R. Tansill, as counsel, filed.

1957

Nov. 19—Motion by petitioner for leave to file motion to vacate decision, to reopen proceeding and to take further testimony, motion to vacate decision, to reopen case, and to take further testimony, lodged, affidavit attached. Denied 11/27/57. Served 12/5/57.

Nov. 21—Notice of hearing Nov. 27, 1957, at Wash., D. C. on petitioner's motion. Served 11/21/57.

Nov. 27—Hearing on petitioner's motion to file motion to vacate decision, to reopen case and take further testimony. Petitioner's oral motion to continue—Denied 11/27/57.

Dec. 3—Petition for Review by U. S. Court of Appeals for the Ninth Circuit, filed by petitioner.

Dec. 3—Notice of filing petition for review with proof of service thereon, filed.

Dec. 4—Transcript of Hearing 11/27/57 filed.

1958

Jan. 9—Motion by petitioner for extension of time for filing record on review and docketing petition for review for 50 days, filed.

Jan. 9—Order extending time for filing record on review and docketing petition for review to Mar. 3, 1958.

Feb. 21—Designation of contents of record, with proof of service thereon, filed.

Feb. 21—Statement of Points, with proof of service thereon, filed.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW OF DEFICIENCY DETERMINATION

The above named Petitioner hereby petitions for a redetermination of the deficiency set forth by Respondent in his Notice of Deficiency (Internal Revenue Service symbols Ap:SF:AA:DRU 150-D. GEW) dated June 28, 1954, and as a basis of its proceedings, alleges as follows:

1. Petitioner is a corporation incorporated, organized and existing under the laws of the Republic of Panama, with its principal office presently located at 107 Bis Paseo de la Reforma, Mexico, D.F. in the Republic of Mexico. The returns with respect to which the deficiency herein is asserted by Respondent were filed with the Collector of Internal Revenue for the 1st District of California, at San Francisco, California.

2. The notice of deficiency, a copy of which, marked Exhibit A, is annexed hereto, was mailed to Petitioner at Mexico, D.F. on June 28, 1954.

3. The deficiency as determined by Respondent is in income taxes for the calendar years 1948, 1949 and 1950, in the aggregate amount of $474,328.83, all of which is in dispute.

4. The determination of tax as set forth in said Notice of Deficiency is based upon the following errors:

(a) Although, during the calendar years 1948,

1949 and 1950, Petitioner, a foreign corporation, was actually engaged in trade or business within the United States within the meaning of Section 231 of the Internal Revenue Code, Respondent erroneously held that Petitioner was a foreign corporation not engaged in trade or business within the United States and subject to income tax liability under the provisions of Section 231 of the Internal Revenue Code.

(b) Respondent erroneously disallowed all deductions for interest, expenses and loss on sale of property and the dividends received credit under Section 26 (b)(1) of the Internal Revenue Code for the years 1948, 1949 and 1950, as claimed in Petitioner's income tax returns for said years, on the grounds that Petitioner was not engaged in trade or business within the United States and that such deductions were not connected with income derived from sources within the United States.

(c) In determining whether the numerous, important and varied, lawful business transactions and activities in which Petitioner engaged and carried on during the years 1948, 1949 and 1950 in the United States and through its office in the United States under the direction and control of its President, assisted by a Vice President and Assistant Treasurer, all of whom were citizens and residents of the United States, Respondent erroneously failed to view the composite picture of Petitioner's said business activities and transactions in the United States or to treat same as an integrated whole, but

considered said business transactions and activities separately and analyzed each such activity apart.

5. The facts upon which the Petitioner relies as the basis of this proceeding are:

(a) In each of the calendar years 1948, 1949 and 1950, Petitioner was a corporation incorporated, organized and existing under the laws of the Republic of Panama.

(b) On March 13, 1948, Petitioner qualified as a foreign corporation in and under the laws of the State of Nevada and from that date to and including all of the calendar year 1950, remained qualified as such and from the date of its qualification and continuously thereafter and including the calendar year 1950, maintained a business office in Oakland, California.

(c) At all times during the calendar years 1948, 1949 and 1950, Petitioner's Articles of Incorporation provided (among other things) that the purposes for which Petitioner was established were:

"To manufacture, produce and process and to buy, sell, distribute, consign and otherwise dispose of and deal in, at wholesale and at retail, all kinds of milk and milk products; to manufacture, buy, produce and process, and to buy, sell, distribute, consign and otherwise dispose of, at wholesale and at retail, all kinds of food and food products, to raise, buy, sell, distribute and deal in, all kinds of garden, farm and dairy products; to raise, buy, sell and otherwise deal in and dispose of cattle and all other kinds of live stock; to manufacture, lease,

buy, sell, deal in, consign and otherwise dispose of machinery, tools, implements, apparatus, equipment, and any and all other materials, supplies, articles and appliances used in connection with all or any of the purposes aforesaid, or in connection with the sale, transportation or distribution of any or all goods, wares, merchandise or other personal property dealt in or disposed of or handled by the corporation.

"To subscribe for, or cause to be subscribed for, buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, acceptances, drafts and evidences of indebtedness issued or created by other corporations, joint stock companies or associations, whether public, private or municipal, or any corporate body, and while the owner thereof to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including any rights to vote thereon."

(d) At all times during the calendar years 1948, 1949 and 1950, Petitioner's By-Laws provided:

"Section 2. President.—The president shall be the chief executive officer of the corporation, and shall preside at all meetings of the stockholders and directors. He shall have general and active management of the business of the corporation, subject to the board of directors, and shall see that all orders

and resolutions of the board are carried into effect. He shall execute contracts and other obligations authorized by the board, and may, without previous authority of the board, make such contracts as the ordinary business of the corporation shall require. He shall have the usual powers and duties vested in the office of president of a corporation, but may delegate any of his powers to the vice-president. He shall have power to select and appoint all necessary officers and servants of the corporation, except those selected by the board of directors, and to remove all such officers and servants, except those selected by the board of directors, and make new appointments to fill the vacancies."

(e) At all times during which Petitioner maintained such business office at Oakland, California, said office and the business affairs of Petitioner in the United States and abroad were under the direct management and control of Petitioner's President who, during all of said time, was assisted in the transaction of Petitioner's business in and from said office in Oakland, California, by Petitioner's Vice President (who served until the latter portion of 1950) and by Petitioner's Assistant Treasurer, all of whom were citizens of the United States, residing in or immediately adjacent to Oakland, California. None of said officers was ever a shareholder of Petitioner.

(f) At all times during the calendar years 1948, 1949 and 1950, and while Petitioner maintained its said business office at Oakland, California, and

transacted its business in and from the same, Petitioner's President exercised broad discretionary powers in the transaction of its business and in the management and conduct of its affairs and business in the United States.

(g) During said years 1948, 1949 and 1950, Petitioner was engaged in trade or business within the United States, as hereinafter shown.

(h) During each of the calendar years 1948, 1949 and 1950, more than fifty per cent (50%) of Petitioner's gross income was derived from sources outside the United States. Petitioner's gross income reported in its income tax return, from sources within the United States for each of said years was:

Year	Amount
1948	$817,791.39
1949	605,635.10
1950	446,863.19

(i) During the calendar years 1948, 1949 and 1950, Petitioner, among other things, transacted the following principal items of business through its said office in Oakland, California, under the direction of and by and through its aforesaid resident corporate officers:

(1) Borrowed, in a series of transactions, a total of $9,306,000.00 from financial institutions in the United States and secured said borrowings by the hypothecation in the United States of Petitioner's securities. Said sums were borrowed and used by

Petitioner for the purposes of Petitioner's business:

(2) Made principal repayments on its said borrowings, from time to time, which said repayments aggregated the sum of $5,580,000.00;

(3) Made numerous payments of interest on its said borrowings, from time to time, which said interest payments aggregated the sum of $278,989.65;

(4) Sold securities from its portfolio of securities for the aggregate sum of $538,119.40;

(5) Collected dividends from its stocks in United States Corporations, organized and existing under the laws of states of the United States, aggregating $1,867,384.70;

(6) Purchased from a processor one carload of butterfat for the total sum of $46,212.75 and resold the same;

(7) Received from purchasers separate written purchase orders from time to time, for over 90 carloads of tin cans; issued its own purchase orders, from time to time, for said tin cans to a manufacturer of said cans and sold said cans and caused said cans to be shipped to the purchasers thereof; invoiced the purchasers of said cans for the price thereof, collected the amounts of said invoices and deposited the same in its bank accounts in the United States; received invoices for the said cans which it purchased and paid the manufacturer of said cans for its price thereof. The total sales price of said cans so sold was $223,996.73.

(8) Sold various items of merchandise to customers in Mexico, which said items Petitioner purchased in the United States and caused to be shipped to said customers in Mexico;

(9) Maintained its bank accounts in banks within the United States, in which all receipts and gross income from sources within the United States were deposited. Drew checks against one of said accounts, signed by Petitioner's President and its Vice President or Assistant Secretary, over 200 in number, which aggregated the sum of over $2,300,000.00 during the years 1948, 1949 and 1950;

(10) Prepared and filed its income tax and other tax returns and paid the taxes thereon;

(11) During said years 1948, 1949 and 1950, Petitioner's President, in and from Petitioner's said office in Oakland, California, exercising wide discretionary powers in actively directing Petitioner's affairs and business, both within and outside the United States, kept in touch with Petitioner's business affairs, office and officers in Mexico, D.F. and elsewhere by air mail letter, telephone and telegraph, and by means of numerous trips which he made to Mexico and to other places in Central and South America;

(12) The value of Petitioner's portfolio of United States securities, at the time it commenced to transact business in the United States and before any thereof were sold, exceeded the sum of $7,000,000.00.

Wherefore, Petitioner prays that the Court may hear the proceedings and determine that there is no deficiency for any of said years 1948, 1949 or 1950.

Dated: October 28, 1954.

/s/ M. W. DOBRZENSKY,
/s/ EDWARD B. KELLY,
/s/ S. H. DOBRZENSKY,
Counsel for Petitioner.

Duly Verified.

(Copy)
Regional
Appellate Division—San Francisco Region
Room 1010, 870 Market Street
San Francisco 2, California

Ap:SF:AA:DRU
150-D:GBW

June 28, 1954

Continental Trading Inc.
107 Bis Paseo de la Reforma
Mexico City, D. F.

Gentlemen:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1948, December 31, 1949 and December 31, 1950, disclosed deficiencies in tax aggregating $474,328.83 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiencies mentioned.

Within 150 days from the date of the mailing of this letter you may file a petition with The Tax

Court of the United States, at its principal address, Washington 4, D. C., for a redetermination of the deficiencies. In counting the 150 days you may not exclude any day unless the 150th day is a Saturday, Sunday or legal holiday in the District of Columbia in which event that day is not counted as the 150th day. Otherwise Saturdays, Sundays and legal holidays are to be counted in computing the 150-day period.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Assistant Regional Commissioner, Appellate, Room 1010, 870 Market Street, San Francisco 2, California. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies, and will prevent the accumulation of interest, since the interest period terminates 30 days after receipt of the form, or on the date of assessment, or on the date of payment, whichever is earlier.

Very truly yours,

T. Coleman Andrews,
Commissioner,
By Wm. G. Wilker,
Special Assistant,
Appellate Division.

Enclosures:
Statement
Form 1276
Agreement Form

STATEMENT

Ap:SF:AA:DRU
150-D:GBW

Continental Trading Inc.
107 Bis Paseo de la Reforma
Mexico City, D. F.

Tax Liability for the Taxable Years Ended December 31, 1948, December 31, 1949 and December 31, 1950

	Income Tax		
Year	Liability	Assessed	Deficiency
1948	$247,090.65	$38,790.06	$208,300.59
1949	180,637.56	29,077.85	151,559.71
1950	132,487.20	18,018.67	114,468.53
Totals	$560,215.41	$85,886.58	$474,328.83

In making this determination of your income tax liability, careful consideration has been given to your protest filed January 18, 1954 and to the statements made at the conferences held on May 6, 1954 and June 3, 1954.

A copy of this letter and statement has been mailed to your representative, Mr. M. W. Dobrzensky, 1516 Central Bank Building, Oakland 12, California, in accordance with the authority contained in the power of attorney executed by you.

Adjustments to Net Income
Year: 1948

Net income as disclosed by return	$680,527.54
Unallowable deductions and additional income:	
(a) Various deductions	137,263.85
(b) Less from sale of property other than capital assets	5,844.11
Gross income as revised	$823,635.50

Explanation of Adjustments

(a) and (b) Your returns were filed on the basis that you were a foreign corporation but engaged in trade or business in the United States during the years 1948, 1949, and 1950; and the tax liabilities shown on your returns were computed under the provisions of sections 13 and 14, Internal Revenue Code.

On the basis of information submitted and after consideration of the contentions raised in the protest filed by you, it is held that you are a foreign corporation not engaged in trade or business within the United States and subject to income tax liability determined under the provisions of section 231, Internal Revenue Code.

In accordance with section 231 there are excluded from your taxable income the miscellaneous gains derived from sales of property in 1949 and 1950 as reported on your returns. In accordance with section 232 there are disallowed all deductions for interest, expenses and loss on sale of property for years 1948, 1949 and 1950 as claimed on your returns on the ground that such deductions were not connected with income derived from sources within the United States.

Computation of Income Tax
Year: 1948

Gross income	$823,635.50
Dividends received credit	0.00
Gross income subject to income tax	$823,635.50
Income tax at 30%	$247,090.65
Income tax assessed	
Account No. 4101435, First California District	38,790.06
Deficiency in income tax	$208,300.59

Adjustments to Net Income
Year: 1949

Net income as disclosed by return	$510,137.85
Unallowable deductions and additional income:	
(a) Various deductions	95,497.25
Total	$605,635.10
Nontaxable income and additional deductions:	
(a) Other income	3,509.90
Gross income as revised	$602,125.20

Explanation of Adjustments

(a) Various deductions in the sum of $95,497.25 are disallowed as explained in income adjustments for the year 1948.

(b) The amount of $3,509.90 representing other income in the United States is eliminated from gross income.

Computation of Income Tax
Year: 1949

Gross income	$602,125.20
Dividends received credit	0.00
Gross income subject to income tax	$602,125.20
Income tax at 30%	$180,637.56
Income tax assessed	
Account No. 410007, District Nevada	29,077.85
Deficiency in income tax	$151,559.71

Adjustments to Net Income
Year: 1950

Net income as disclosed by return	$361,407.52
Unallowable deductions and additional income:	
(a) Various deductions	85,455.67
Total	446,863.19
Nontaxable income and additional deductions:	
(a) Other income	5,239.19
Gross income as revised	$441,624.00

Explanation of Adjustments

(a) Various deductions in the sum of $85,455.67 are disallowed as explained in income adjustments for the year 1948.

(b) The amount of $5,239.19 representing other income in the United States is eliminated from gross income.

Computation of Income Tax
Year: 1950

Gross income	$441,624.00
Dividends received credit	0.00
Gross income subject to income tax	$441,624.00
Income tax at 30%	$132,487.20
Income tax assessed	
Account No. 4280201, District Nevada	18,018.67
Deficiency in income tax	$114,468.53

Served Nov. 5, 1954.

[Endorsed]: T.C.U.S. Filed Nov. 4, 1954.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3 of the petition.

4. (a), (b) and (c) Denies the allegations of error contained in subparagraphs (a), (b) and (c) of paragraph 4 of the petition.

5. (a) Admits the allegations contained in subparagraph (a) of paragraph 5 of the petition.

(b) to (f), inclusive. For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraphs (b) to (f) inclusive, of paragraph 5 of the petition.

(g) Denies the allegations contained in subparagraph (g) of paragraph 5 of the petition.

(h) For lack of knowledge or information sufficient to form a belief, denies the allegations contained in subparagraph (h) of paragraph 5 of the petition.

(i) Denies the allegations contained in subparagraph (i) and all subparagraphs thereunder, of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the petition not hereinbefore admitted, qualified or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

/s/ R. P. HERTZOG, G.M.
Acting Chief Counsel,
Internal Revenue Service.

Of Counsel: Melvin L. Sears, Regional Counsel, T. M. Mather, Assistant Regional Counsel, A. S. Resnik, Special Attorney, Internal Revenue Service.

[Endorsed]: T.C.U.S. Filed Dec. 21, 1954.

[Title of Tax Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the Commissioner of Internal Revenue and the above named taxpayer, by and through their respective attorneys, that the following facts should be taken as true, provided, however, that this stipulation does not waive the right of either party to introduce other evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any such facts on the grounds of immateriality or irrelevancy:

1. Petitioner is a corporation, incorporated, organized and existing under the laws of the Republic of Panama on May 28, 1947, with its principal office located at No. 107 Bis Paseo de la Reforma, Mexico, D.F., in the Republic of Mexico. The returns with respect to which the deficiencies herein are asserted by Respondent were filed by

the Petitioner as follows: The return for 1948 was filed with the Collector of Internal Revenue at San Francisco instead of with the Collector at Reno, Nevada, and the returns for 1949 and 1950 were filed with the Collector of Internal Revenue for the District of Nevada, at Reno, Nevada.

2. The said income tax returns filed by Petitioner as aforesaid set forth that more than 50% of petitioner's gross income was derived from sources outside the United States, and reported Petitioner's gross income from sources within the United States for each of said years as follows:

Year	Amount
1948	$817,791.39
1949	605,635.10
1950	446,863.19

3. The notice of deficiencies, a copy of which, marked Exhibit A, is annexed to the petition, was mailed to Petitioner at Mexico D.F. on June 28, 1954.

4. The deficiencies, as determined by Respondent, are in income taxes for the calendar years 1948, 1949 and 1950, in the aggregate amount of $474,328.83, all of which is in dispute.

5. At all times during the calendar years 1948, 1949 and 1950 Petitioner's Articles of Incorporation provided, among other things, that the purposes for which Petitioner was established were:

"To manufacture, produce and process and to buy, sell, distribute, consign and otherwise dispose of and deal in, at wholesale and at retail, all kinds

of milk and milk products; to manufacture, buy, produce and process, and to buy, sell, distribute, consign and otherwise dispose of, at wholesale and at retail, all kinds of food and food products, to raise, buy, sell, distribute and deal in, all kinds of garden, farm and dairy products; to raise, buy, sell and otherwise deal in and dispose of cattle and all other kinds of livestock; to manufacture, lease, buy, sell, deal in, consign and otherwise dispose of machinery, tools, implements, apparatus, equipment, and any and all other materials, supplies, articles and appliances used in connection with all or any of the purposes aforesaid, or in connection with the sale, transportation or distribution of any or all goods, wares, merchandise or other personal property dealt in or disposed of or handled by the corporation.

"To subscribe for, or cause to be subscribed for, buy, own, hold, purchase, receive or acquire, and to sell, negotiate, guarantee, assign, deal in, exchange, transfer, mortgage, pledge or otherwise dispose of, shares of the capital stock, scrip, bonds, coupons, mortgages, debentures, debenture stock, securities, notes, acceptances, drafts and evidences of indebtedness issued or created by other corporations, joint stock companies or associations, whether public, private or municipal, or any corporate body, and while the owner thereof to possess and to exercise in respect thereof all the rights, powers and privileges of ownership, including any rights to vote thereon."

6. At all of the times during the calendar years

1948, 1949 and 1950, Petitioner's By-Laws, among other things, provided the matters and things set forth in Exhibit I, which is annexed hereto and hereby made a part hereof.

7. That at all times during the calendar years 1948, 1949 and 1950,

(a) Grover D. Turnbow, who is a citizen of the United States and a resident of the City of Piedmont, County of Alameda, State of California, and who maintained offices at 1106 Broadway, Oakland 12, California, was the President of Petitioner, International Dairy Supply Co. and International Dairy Engineering Co., referred to in paragraphs 9 and 10 of this Stipulation. International Dairy Association, Inc. also maintained its offices at 1106 Broadway, Oakland, California, in the same suite of offices occupied by said Grover D. Turnbow, and their names appeared in the office directory of said building and on the door leading into the suite of offices occupied by said Grover D. Turnbow.

(b) At all times during the years 1948, 1949 and until the end of 1950, M. W. Dobrzensky, a citizen of the United States and a resident of the City of Piedmont, County of Alameda, State of California, with offices at 436 Fourteenth Street, Oakland, California, and said M. W. Dobrzensky was an attorney at law and a member of the firm of Fitzgerald, Abbott & Beardsley.

(c) At all times during the calendar years 1948, 1949 and 1950, Marion O. Palmer was the secretary to Grover D. Turnbow, occupying offices with

him in said suite of offices at said 1106 Broadway, Oakland, California.

8. Neither said Grover D. Turnbow nor said M. W. Dobrzensky nor said Marion O. Palmer owned any of the shares of stock of Petitioner.

9. International Dairy Supply Company is a corporation which was incorporated under the laws of Nevada on February 3, 1948. At all times after its incorporation and during 1948, 1949 and 1950, Grover D. Turnbow was the President thereof and the owner of all of its issued and outstanding capital stock. Said corporation was engaged in supplying recombined dairy products to the U. S. Armed Forces in the Far East, pursuant to a contract dated July 1, 1948, identified as No. W-11-027-QM-99649, O.I.F.H. 1225 SHD.

10. International Dairy Engineering Co. is a California corporation, incorporated on the 1st day of July, 1950, and at all times thereafter Grover D. Turnbow was President thereof and the owner of all of its issued and outstanding capital stock.

11. International Dairy Association, Inc. is a Panamanian Corporation, incorporated in the year 1946, and at all times thereafter Grover D. Turnbow was the owner of 10% of its outstanding capital stock.

12. As shown by Exhibit II, which is annexed hereto, incorporated herein and hereby made a part hereof, Petitioner qualified as a foreign corporation in the State of Nevada on March 13, 1948 and remained qualified as such during the remainder of the year 1948, and during the calendar years 1949

and 1950. Petitioner withdraw from the State of Nevada as a foreign corporation on or about March 31, 1951. Petitioner never qualified as a foreign corporation authorized to do intrastate business in any other state in the United States.

13. As shown by Exhibit III, which is annexed hereto, incorporated herein and hereby made a part hereof, Nevada Agency and Trust Company, a corporation, whose business, among other things, was to act as Resident Agent for foreign corporations, with offices in the Cheney Building at 139 North Virginia Street, Reno, Nevada (P.O. Box 2540), acted as Resident Agent of Petitioner in the State of Nevada.

14. After March 13, 1948 and during the calendar years 1949 and 1950, Petitioner maintained a checking account with First National Bank of Nevada at Reno, Nevada, and starting with the 18th day of March, 1948, and during the remainder of that year and during the years 1949 and 1950, drew a total of 179 checks against said bank account. All of said checks were paid by said drawee bank. Annexed hereto, hereby made a part hereof and marked Exhibit IV, is a list of all checks drawn by Petitioner as aforesaid against said First National Bank of Nevada at Reno, showing the number of each check, the date thereof, the inscription on the voucher thereof, and the amount of each such check.

15. In the years 1948, 1949 and 1950, Petitioner maintained a checking account with Bank of America N.T. & S.A. in San Francisco, California, and

starting with May 23, 1948, made 20 withdrawals therefrom. Annexed hereto, made a part hereof and marked Exhibit V is a list of all checks drawn against said Bank of America, showing check number, date of each check, to whom and for what payable, and the amount thereof. Each of said checks was paid by the drawee bank.

16. In the calendar years 1948, 1949 and 1950:

I.

(1) On January 1, 1948, Petitioner was indebted to Bank of America N.T. & S.A. at San Francisco, California, in the principal sum of $1,100,000.00, evidenced by Petitioner's promissory note of December 31, 1947, the original of which said note is annexed hereto, made a part hereof and marked Exhibit VI. Installments of interest on said note were paid by Petitioner to said bank on the several dates shown by the endorsements of interest payments appearing on the back of said promissory note.

(2) As shown by Exhibit VII, which is annexed hereto, and hereby made a part hereof, Petitioner's said note of December 31, 1947 was secured by a pledge of 55,000 shares of Servel, Inc. common stock and 258,700 shares of common stock of Electrolux Corporation owned by it.

II.

(1) On May 21, 1948 at San Francisco, California, Petitioner made, executed and delivered unto Bank of America N.T. & S.A. its promissory

note for the sum of $1,000,000.00, evidencing a loan by said Bank of America to Petitioner in said sum. Said note was secured by a pledge of even date therewith, the original of which Pledge is annexed hereto, made a part hereof, and marked Exhibit VIII.

(2) Annexed hereto, made a part hereof and marked Exhibit IX is a copy of the letter of transmittal of May 20, 1948 from Petitioner to said bank, transmitting to said bank the aforesaid note, pledge and pledgeholders' agreement and other instruments evidencing and securing said loan. Annexed hereto, made a part hereof and marked Exhibit X is a copy of the letter from said bank to Petitioner, bearing date May 22, 1948, acknowledging receipt of the instruments transmitted in Petitioner's said letter of May 20, 1948.

(3) Annexed hereto and hereby made a part hereof and marked Exhibit XI is the original of Petitioner's said promissory note of May 21, 1948, on the reverse side of which note are endorsements by the payee showing the date and amount of payments by Petitioner of the interest and principal thereon, and showing that on September 8, 1949 said note was refinanced by Petitioner's promissory note of September 8, 1949 in the principal sum of $1,700,000.00, after payment of $150,000.00 on the balance of said note as of September 8, 1949.

III.

(1) On August 6, 1948 at San Francisco, California, Petitioner made, executed and delivered to

Bank of America N.T. & S.A. its promissory note in the principal sum of $1,850,000.00. Said note was secured by said 55,000 shares of Servel, Inc. common stock, by said 258,700 shares of Electrolux Corporation common stock, plus an additional 45,000 shares of Electrolux common stock. Said note was given to evidence Petitioner's indebtedness of $1,850,000.00, evidencing a loan by said bank to Petitioner. The original of said note is annexed hereto, made a part hereof and marked Exhibit XII, along with the endorsements on the back thereof, showing dates and amounts of payments by Petitioner of installments of principal and interest thereon. As shown by the last endorsement appearing on the reverse of said note, the balance thereof as at September 8, 1949 was refinanced by Petitioner's promissory note of September 8, 1949, payable to said Bank of America in the amount of $1,700,000.00.

(2) Annexed hereto, made a part hereof and marked Exhibit XIII is an advice from said Bank of America to Petitioner, bearing date August 6, 1948, showing a distribution of the proceeds of said note of August 6, 1948 in the principal sum of $1,850,000.00 as follows: The application of $1,100,000.00 to the payment of Petitioner's said promissory note of December 31, 1947 in the sum of $1,100,000.00, and the credit to Petitioner's account in said bank of the sum of $750,000.00.

IV.

(1) On September 8, 1949 Petitioner made, exe-

cuted and delivered to Bank of America N.T. & S.A. at San Francisco, California, its promissory note in the principal sum of $1,700,000.00, evidencing the loan by said bank to Petitioner of said sum. Said note was secured by a pledge of said 55,000 shares of the common stock of Servel, Inc. and 303,700 shares of the common stock of Electrolux Corporation. The original of said note of September 8, 1949, together with endorsement of Petitioner's payments of installments of interest and principal thereon, appearing on the reverse thereof, is annexed hereto and made a part hereof and marked Exhibit XIV.

(2) Annexed hereto, made a part hereof and marked Exhibit XV is a copy of the Pledge Agreement of September 8, 1949 which accompanies said promissory note.

(3) Annexed hereto, made a part hereof and marked Exhibit XVI is a letter from Bank of America N.T. & S.A. at San Francisco, California, dated September 2, 1949, showing a proposal from said bank preceding the said loan of September 8, 1949 and Petitioner's letter of August 31st, 1949 to which it replies.

(4) Annexed hereto, made a part hereof and marked Exhibit XVII is a copy of a letter from Petitioner dated September 8, 1949, addressed to said Bank of America N.T. & S.A. with respect to said loan of September 8, 1949 and enclosing the documents therein enumerated, which said copy of letter bears the receipt of said bank, dated September 8, 1949.

(5) As shown by the endorsement appearing on the face of said note, the same was paid by Petitioner on January 3, 1950.

V.

In the month of December, 1949, petitioner sold 10,000 shares of the capital stock of Servel, Inc., which 10,000 shares was part of the 55,000 shares thereof pledged to said Bank of America N.T. & S.A. as security for the indebtedness of Petitioner to said bank. Said sale was made through Land Title Bank & Trust Company of Philadelphia, Pa., to Mr. Paul Jones for a total price of $95,000.00. Petitioner caused $66,500.00 thereof to be credited against its $1,700,000.00 note with Bank of America N.T. & S.A. Annexed hereto, made a part hereof and marked Exhibit XVIII (1), (2) and (3) are the documents which show consummation of such sale of said 10,000 shares of the capital stock of Servel, Inc.

VI.

In the month of December, 1949, Petitioner sold the remaining 45,000 shares of capital stock of Servel, Inc.

(1) One lot of 5300 shares was sold on or about December 13, 1949 for $52,648.91, of which $15,794.91 was transmitted by Bank of America to Petitioner's bank account at First National Bank of Nevada at Reno, Nevada, and the balance thereof, $36,854.00, was credited on Petitioner's note for $1,700,000.00.

(2) Another lot of said stock, comprising 3200

shares, was sold by Petitioner on or about December 15, 1949 for the aggregate sum of $31,818.38, of which Bank of America N.T. & S.A. transmitted $9,546.38 for deposit to Petitioner's account with First National Bank of Nevada at Reno, and credited $22,272.00 upon Petitioner's said promissory note for $1,700,000.00.

(3) On or about December 16, 1949, Petitioner sold 2,000 shares of said Servel stock for a total sum of $19,861.09, of which Bank of America N.T. & S.A. transmitted $5,959.09 for deposit to the account of Petitioner with First National Bank of Nevada at Reno, and credited $13,902.00 to Petitioner's said promissory note of $1,700,000.00.

(4) That on or about December 19, 1949, Petitioner sold 34,500 shares of said Servel common stock for the total sum of $338,753.60 and Bank of America transmitted $101,626.60 thereof for deposit to the account of Petitioner with First National Bank of Nevada at Reno, and credited the sum of $237,127.00 on Petitioner's said $1,700,000.00 note.

(5) All of said Servel stock was sold through Bank of America N.T. & S.A. upon the instruction and direction of Petitioner and the said sales, with the exception of the sale of 10,000 shares to Paul Jones, were made through Dean Witter & Co., brokers, of 45 Montgomery Street, San Francisco, California, with proceeds paid to Bank of America for the account of Petitioner for disbursal as aforesaid.

VII.

(1) On September 8, 1949, Petitioner bor-

rowed from Grover D. Turnbow the principal sum of $150,000.00, evidenced by Petitioner's promissory note in that sum, secured by a pledge of 22,315 shares of the capital stock of Electrolux Corporation. Annexed hereto, made a part hereof and marked Exhibit XIX is the original of said note and pledge, with attached certificate by the secretary of Petitioner. On September 19, 1949 Petitioner paid said Grover D. Turnbow on account of said note the principal sum of $15,000.00, plus interest in the sum of $199.90; on December 5, 1949, Petitioner paid said Grover D. Turnbow on account of the principal sum of said note the sum of $10,000.00; and on March 31, 1950, Petitioner paid said Grover D. Turnbow the balance of the principal sum of said note, viz: the sum of $65,000.00, plus interest thereon in the sum of $1,462.73.

(2) On December 16, 1949, Grover D. Turnbow advanced for the account of Petitioner, at its request, the sum of $50,000.00, and on December 19, 1949 Petitioner repaid said sum to said Grover D. Turnbow.

(3) On December 19, 1949, at the request of Petitioner, Grover D. Turnbow advanced to Petitioner the further sum of $50,000.00, which said sum Petitioner repaid to said Grover D. Turnbow on December 20, 1949.

VIII.

Petitioner, being indebted to Teleric, Incorporated of New York City, pursuant to a series of 15 promissory notes in the principal amount of $61,733.33 each, aggregating $926,000.00 dated No-

vember 18, 1947 and due July 1, 1952, made interest payments on said loan as follows:

(1) January 10, 1949 in the sum of $18,520.00;

(2) July 6, 1949, in the sum of $18,520.00.

Annexed hereto, made a part hereof and marked Exhibits XX (1) and (2) are paid checks of Petitioner evidencing the same.

IX.

(1) On January 3, 1950 Petitioner borrowed from Central Hanover Bank & Trust Company of New York, the principal sum of $2,000,000.00, evidencing said loan by Petitioner's promissory note dated December 30, 1949, which said loan was secured by the hypothecation of 350,000 shares of the capital stock of Electrolux Corporation. 343,700 shares of said Electrolux stock were held by Bank of America N.T. & S.A. at San Francisco, which said stock was transferred by Bank of America to said Central Hanover Bank & Trust Company at the request of Petitioner. The proceeds of said $2,000,000.00 loan were transferred by said Central Hanover Bank & Trust Company, through the Federal Reserve Bank for the credit of Bank of America N.T. & S.A., San Francisco, for the account of Petitioner. Bank of America N.T. & S.A. applied $1,667.03 thereof on account of the unpaid interest on Petitioner's promissory note in the principal sum of $1,700,000.00 dated September 8, 1949 and, upon the direction of Petitioner, forwarded to National City Bank of New York for Petitioner the sum of $110,000.00, and transferred to Banco In-

ternationale of Mexico City, for the account of Petitioner, the sum of $390,000.00, and credited to Petitioner's checking account with said Bank of America the balance of said $2,000,000.00 fund, that is to say, the sum of $274,987.97.

(2) Annexed hereto and hereby made a part hereof and marked Exhibits XXI (1), (2), (3), (4), (5), (6) and (7) are copies of letters and documents showing the consummation of the loan transaction between Petitioner and said Central Hanover Bank & Trust Company and the disbursement of funds received by said Bank of America N.T. & S.A. from said Central Hanover Bank & Trust Company.

(3) On March 15, 1950, Petitioner paid said Central Hanover Bank & Trust Company $150,000.00 on account of the principal sum of said $2,000,000.00 loan, and interest in the sum of $16,444.44. Attached hereto, hereby made a part hereof and marked Exhibits XXII (1) and (2) is an original letter from said Central Hanover Bank & Trust Company dated March 15, 1950, to Petitioner, attached to which is the paid check of Petitioner in the sum of $16,444.44 covering the check of Central Bank of Oakland in that amount, referred to in said letter.

X.

(1) In December, 1948, Petitioner received from International Dairy Supply Company a written order for one lot of tin cans, to be shipped for its account to a point outside California. Prior thereto, International Dairy Supply Company had ordered

three lots of such cans directly from Western Can Co., as shown by Exhibit XXIII (1). Said order was then the subject of an order by Petitioner to Western Can Co., as shown by Exhibit XXIII (2). Prior to the transmission of such written order, a telephonic notification thereof was given to Western Can Co.

(2) In 1949 and 1950, Petitioner received from International Dairy Supply Company written orders for cans to be shipped for its account to points outside California.

(3) Annexed hereto and marked Exhibit XXIV is an original of one such order, which is intended as an exemplar of all the orders received, relating to the above-mentioned contract.

(4) Upon receipt of each such order, said Marion O. Palmer prepared an order for such cans and transmitted the same to Western Can Co., of San Francisco, California.

(5) Annexed hereto and marked Exhibit XXV is a full, true and correct copy of the form of such order which is intended as an exemplar of the form of all of said orders.

(6) After each carload of cans was shipped by Western Can Co., it invoiced Petitioner for each such carload of cans so shipped.

(7) Annexed hereto and made a part hereof and marked Exhibit XXVI is an original invoice received by Petitioner from Western Can Co. (each of which such invoices was subject to a 1% discount for cash), which such invoice is intended as

an exemplar of all of the invoices received by Petitioner from Western Can Co.

(8) Each such invoice received from Western Can Co. was paid by a check drawn on Petitioner's account with the First National Bank of Nevada at Reno, Nevada on the basis of the invoice price, less 1%.

(9) Annexed hereto and made a part hereof and marked Exhibit XXVI is one of Petitioner's cancelled checks in payment of a Western Can Co. invoice, which such check is intended as an exemplar of the checks of Petitioner, delivered by it to Western Can Co. in payment of such invoices.

(10) Marion O. Palmer prepared invoices for each such carload of cans and annexed hereto, made a part hereof and marked Exhibit XXVII is a full, true and correct copy of such an invoice, which is intended as an exemplar of all of the invoices which Petitioner sent International Dairy Supply Company.

(11) International Dairy Supply Company paid the price of each such carload of cans as invoiced to it by Petitioner, on the basis of the price invoiced by Petitioner, less a discount of 1% for cash.

(12) Annexed hereto and made a part hereof and marked Exhibit XXVIII is a schedule showing (a) the date and amount of payment (after a 1% cash discount) by Petitioner of each invoice which Petitioner received from Western Can Co., (b) the date and amount of payment (after a 1% cash discount) to Petitioner of each invoice by In-

ternational Dairy Supply Company, and (c) the profit of Petitioner on each such transaction. Items 28, 66 and 85 in Exhibit XXVIII are transactions wherein Petitioner ordered cans from Western Can Co. for Farmers Cooperative Creamery of McMinneville, Oregon, which such cans were invoiced by Western Can Co. to Petitioner and in turn by it to said Creamery, which paid for same as shown in said Exhibit. On August 9th, 1949, International Dairy Engineering Company ordered one carload of lithographed tin cans for shipment to Farmers Cooperative Creamery at McMinneville, Oregon in a transaction similar to the transaction evidenced by item 28, 66 and 85 in said Exhibit XXVIII. (Subsequent to 1950 International Dairy Supply Co. bought tin cans from Western Can Company and/or other Can Companies, in connection with aforesaid Armed Forces contract.)

XI.

(1) On July 12, 1948 Petitioner purchased from Kraft Foods Company of Chicago, Illinois, 1632-39 lbs. pails (40,248 pounds) of dry milk fat, for a total price of $46,212.75.

(2) On August 18, 1948 Petitioner resold said 40,248 pounds of dry milk fat to Kraft Foods Company for a price of $40,248.00.

(3) Attached hereto and made a part hereof and marked Exhibit XXIX (1), (2) and (3) are (a) letter of September 18, 1953 from Kraft Foods Company recounting the transaction, (b) copy of letter dated August 20, 1948 to S. L. Denning, and

(c) copy of Invoice No. 23074, dated July 12, 1948 from Kraft Foods Company to Petitioner.

XII.

(1) In 1950 Petitioner, as an accommodation to Lecheria Nacional, S. A. of Mexico, D. F. purchased the items hereinafter specified from Creamery Package Co. and paid for the same and received reimbursement therefor from said Lecheria Nacional, S. A. as follows:

Date	Item	Amount
5/31/50	Creamery Package Washmaster	$4,725.00
10/ 9/50	Parts & supplies for Homogenizer	18.03
10/16/50	Rim gaskets	23.56
11/24/50	3-phase Motor	133.65
	Total	$4,900.24

(2) On December 5, 1950 Petitioner, as an accommodation to said Lecheria Nacional, S.A. purchased from Pfaudler Sales Co. certain parts for a homogenizer pressure valve and paid therefor the sum of $34.50 and received reimbursement therefor from Lecheria Nacional, S.A.

(3) Annexed hereto and made a part hereof and marked Exhibit XXX (1), (2), (3), (4) and (5), are original invoices from Creamery Package Co. and from Pfaudler Sales Co. for the above mentioned items, attached to each of which such invoices is Petitioner's cancelled check for payment of same.

XIII.

During the years 1948, 1949 and 1950, Nevada Agency and Trust Company, Petitioner's resident agent in Reno, Nevada, collected dividends on the shares of Servel, Inc. and Electrolux Corporation owned by Petitioner, depositing same to Petitioner's checking account in First National Bank of Nevada, at Reno, Nevada, as follows:

Date	Amount
Mar. 17, 1948	$146,406.00
June 21, 1948	183,007.50
Sept. 15, 1948	183,007.50
Oct. 6, 1948	27,502.00
Dec. 17, 1948	27,502.00
Dec. 22, 1948	256,210.50
Mar. 21, 1949	146,406.00
June 20, 1949	146,406.00
Sept. 6, 1949	146,406.00
Dec. 16, 1949	146,406.00
Dec. 27, 1949	16,501.50
Mar. 18, 1950	146,406.00
June 17, 1950	146,406.00
Sept. 18, 1950	146,406.00
Dec. 22, 1950	2,406.00
Total	$1,867,385.00

XIV.

During the years 1948, 1949 and 1950, Petitioner paid miscellaneous items of expense by its checks drawn on its account with the First National Bank of Nevada at Reno, Nevada, at the times, to the

persons and in the amounts set forth in Exhibit XXXI, hereunto annexed.

Dated: August, 1956.

/s/ JOHN POTTS BARNES, G.M.,
Attorney for Respondent.

/s/ M. W. DOBRZENSKY,
/s/ S. H. DOBRZENSKY,
Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed Aug. 30, 1956.

[Title of Tax Court and Cause.]

SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated by and between the parties above named, through their respective attorneys, as follows:

There are attached hereto and made a part hereof as Exhibits A, B, and C, respectively, photostatic copies of the 1948, 1949, and 1950 Federal corporation income tax returns, Forms 1120, filed by petitioner. The said returns are referred to in paragraph 1 of the Stipulation of Facts herein.

/s/ S. H. DOBRZENSKY,
Counsel for Petitioner.

/s/ JOHN POTTS BARNES, G.M.,
Chief Counsel, Internal Revenue Service, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 30, 1956.

[Title of Tax Court and Cause.]

SECOND SUPPLEMENTAL STIPULATION OF FACTS

It is hereby stipulated by and between the parties hereto that the following facts should be deemed as true for purposes of this proceeding, reserving to each party the right to object to the materiality or relevance of any fact:

1. At least as early as January, 1947, Grover D. Turnbow was acting as attorney in fact for Axel Wenner-Gren, who was then living in Mexico City.

2. Axel Wenner-Gren was the owner of a substantial quantity of Electrolux and Servel stock.

3. On January 13, 1947 a loan of $500,000 was made by the Bank of America N.T. & S.A. to Axel Wenner-Gren, secured by 55,000 shares of Servel stock and 50,000 shares of Electrolux stock.

4. On February 17, 1947 a new loan was made to Wenner-Gren by the bank, substituting the previous loan and increasing Wenner-Gren's loan obligations to $800,000.

5. On May 9, 1947, the bank loaned Wenner-Gren an additional $300,000.

6. On December 31, 1947 the loans of Wenner-Gren were paid from proceeds of a loan made by the bank to petitioner in the amount of $1,100,000, secured by 258,700 shares of Electrolux stock and 55,000 shares of Servel stock. At that time the

bank was advised that petitioner was the incorporation of some of the interests of Wenner-Gren and the purpose of the loan was to pay off Wenner-Gren's obligations to the bank.

7. The loan hereinabove mentioned is the subject of the Stipulation of Facts, page 6.

8. That if Russell Smith, Executive Vice President of Bank of America N.T. & S.A., were called as a witness for Respondent, he would testify that the loan of May, 1948, referred to on page 7 of the Stipulation of Facts, in the sum of $1,000,000.00, was made to petitioner for the purpose stated to the bank by Turnbow, of providing interim capital in connection with Wenner-Gren's obligations in the acquisition of the Mexican Telephone Companies.

/s/ S. H. DOBRZENSKY,
/s/ M. W. DOBRZENSKY,
Counsel for Petitioner.

/s/ JOHN POTTS BARNES, G.M.,
Chief Counsel, Internal Revenue Service, Counsel for Respondent.

[Endorsed]: T.C.U.S. Filed Aug. 31, 1956.

T. C. Memo. 1957-164

Tax Court of the United States

Docket No. 55212. Filed August 30, 1957.

CONTINENTAL TRADING, INC.,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

M. W. Dobrzensky, Esq., and S. H. Dobrzensky, Esq., for the petitioner.

Aaron S. Resnik, Esq., for the respondent.

Opper, Judge: Respondent determined the following deficiencies in income tax:

Year	Deficiency
1948	$208,300.59
1949	151,559.71
1950	114,468.53

The principal issue is whether petitioner qualified as a resident foreign corporation during the years involved by engaging in trade or business within the United States. If petitioner prevails on that issue, a subordinate issue to be considered is whether respondent erred in disallowing deductions for interest, expenses, and loss on sale of property as not connected with income from sources within the United States.

Findings of Fact

Certain facts are stipulated and are hereby found.

Petitioner, a Panamanian corporation organized in May, 1947, maintained its principal office in Mexico City, Mexico. It filed its Federal income tax return for 1948 with the collector of internal revenue for the first district of California, and its 1949 and 1950 returns with the collector of internal revenue for the district of Nevada. Those returns stated that petitioner was a resident foreign corporation with "Investment" as its principal activity.

Petitioner qualified as a foreign corporation in Nevada in March, 1948, and continued to be so qualified until March, 1951. It used for its American address that of Reno, Nevada, company that acted as resident agent for petitioner and other foreign corporations. Petitioner represented that it maintained only one place of business in the United States.

Grover Turnbow, a United States citizen with offices in Oakland, California, served as petitioner's president. After March, 1948, at the suggestion of the California attorney who served as petitioner's vice president, Turnbow had petitioner's name added to the business names already appearing on his Oakland office door and on the building directory, which were: International Dairy Association, Inc., International Dairy Engineering Co., and International Dairy Supply Company, hereafter referred to as Association, Engineering, and Supply, respectively. Turnbow was president and sole stock-

holder of Supply. Petitioner never used the Oakland address on its letterheads or otherwise and paid no rent for the Oakland office.

Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, an internationally famous financier whose wealth was over $1,000,000,000. Wenner-Gren held substantial amounts of stock in the Electrolux and Servel corporations, as well as sizable and diverse holdings in Mexican and other foreign enterprises. Prior to petitioner's incorporation, Turnbow served as attorney in fact in the United States for Wenner-Gren, who was then borrowing large sums from American lending institutions for use outside the United States.

Turnbow became acquainted with Wenner-Gren in Mexico when he erected a recombined milk plant in which Wenner-Gren had a financial interest. Turnbow unsuccessfully sought to interest Wenner-Gren in financing the supplying of milk by Supply to the armed forces in the Far East.

Turnbow and his various enterprises were interested in erecting recombined milk plants in foreign countries. Prior to and during the years here involved, the program failed to materialize because of the inability to reconvert foreign currency into American dollars, and the instability of foreign currencies.

Turnbow hoped that petitioner would assist in the financing of these plants if his program for the establishment of recombined milk plants in foreign countries proved feasible. Its function would be to

secure funds, but without any voice or activity in the operations of the plants. Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose.

After petitioner's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired his stock in the Electrolux and Servel corporations, which it thereupon pledged as security for loans. As of the beginning of 1948, petitioner had assumed indebtednesses of Wenner-Gren as follows:

Bank of America, N. T. & S. A., $1,100,000;
Central Hanover Bank and Trust Company, New York, $480,000;
Teleric, Inc., $926,000.

Petitioner liquidated the loan from Central Hanover Bank during 1948. The loan from Teleric, Inc. remained outstanding as of the end of 1950. It liquidated the loan from Bank of America in August 1948.

From 1948 through 1950, petitioner had no paid employees in the United States. Turnbow received $1,500 per month during the last 6 months of 1950 denominated as salary for his services to petitioner. This represented part of an over-all settlement effectuated in June 1950 between Turnbow and Wenner-Gren, as individuals, whereby Turnbow would receive from Wenner-Gren stock and cash totaling $105,000. The settlement covered, among

other items, Turnbow's services to Wenner-Gren from October 1946 through June 1950.

Petitioner maintained no books of account in the United States. Its only records consisted of bank statements, check books, and documents pertaining to transactions within the United States, all in the care of Turnbow's secretary at Oakland. Petitioner maintained bank accounts in the United States at the First National Bank, Reno, Nevada, and at the Bank of America, N. T. & S. A. in San Francisco.

Petitioner's only assets in the United States at the end of 1948 consisted of Electrolux and Servel stock and the two bank account balances.

Petitioner reported on its tax returns for the years in question that it derived more than 50 per cent of its gross income from sources outside the United States. It reported gross income from sources within the United States, as follows:

1948	$817,791.39
1949	605,635.10
1950	446,863.19

Of the 1948 gross income, $823,635.50 represented dividends on Electrolux and Servel stock. The difference was represented by a reported net loss of $5,844.11 resulting from sales of property other than capital assets. Of the 1949 gross income, $602,-125.20 represented dividends, and $3,509.90 "Other Income in the United States." Of the 1950 gross income, $441,624 represented dividends from the Electrolux Corporation, and $5,239.19 additional income "From Sales."

During 1948, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments of principal and interest on outstanding loans. (c) In May it borrowed $1,000,000 from the Bank of America, which Wenner-Gren used in acquisition of Mexican telephone companies. (d) On August 6, it borrowed $1,850,000 from the Bank of America, of which it used $1,100,000 to repay prior indebtedness of Wenner-Gren to the bank, which petitioner had assumed. On that same date petitioner drew checks in excess of the balance of $750,000 to make payments of principal and interest on other outstanding indebtedness.

During 1949, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux and Servel stock. (b) It made payments on principal and interest on outstanding loans. (c) It secured and repaid short-term advances from Turnbow. (d) In September it borrowed $1,700,000 from the Bank of America, used to liquidate the outstanding balances of two loans from that bank. (e) In December it sold its 55,000 shares of Servel stock, theretofore pledged with the Bank of America to secure loans. It used the proceeds of the sale to pay outstanding obligations to the bank.

During 1950, petitioner's activities in the United States included the following: (a) It collected dividends on Electrolux stock. (b) It made payments on principal and interest on outstanding loans. (c) On January 3, it borrowed $2,000,000 from the Central

Hanover Bank. It used the bulk of this loan to repay the $1,700,000 loan from the Bank of America. It transferred approximately $400,000 to its account in Mexico City, $110,000 for the account of a Swedish bank, and approximately $275,000 to its account at the Bank of America, much of which was thereafter transferred to petitioner's Mexican accounts. (d) Petitioner repaid the $2,000,000 loan. In its negotiations with the Central Hanover Bank, petitioner represented itself as a Panamanian corporation, doing business in foreign countries.

The funds borrowed by petitioner were in the main used by Wenner-Gren. Turnbow had no direct knowledge of their use.

In July 1948, petitioner engaged in a transaction of a type in which it was not previously nor subsequently engaged. It purchased a carload of dry milk fat from Kraft Foods Company for $46,212.75. Through Association, a company in which Turnbow was interested, it resold the fat 1 month later to Kraft for $40,248. Association requested that Kraft made the check payable to petitioner. Petitioner reported the loss in its 1948 tax return.

As an accommodation to a Mexican corporation petitioner purchased, in 1950, equipment for that corporation for which it was reimbursed without profit.

In each year, the only other activity reported by petitioner was represented by nominal amounts of income resulting from transactions relating to cans used by Supply. In 1948, such reported income

amounted to $120.64; in 1949, $3,509.90; in 1950, $5,239.19.

In connection with its contract for supplying recombined milk products to troops in the Far East, Supply found it necessary, commencing in 1948, to obtain tin cans. The contract set forth specifications for the necessary cans to be bought in the United States. In 1948, Supply procured the cans from Western Can Company, hereafter referred to as Western. An employee in Supply's procurement department ordered by telephone the necessary number of cans and followed up with a written purchase order. Supply received shipments for which it paid by check.

In December 1948, petitioner undertook to place with Western, in its own name, an order covering precisely the same type of cans and bearing the same markings as Supply had theretofore ordered in its own name from Western. Western billed petitioner at the same price which Supply had paid Western on an earlier order. That order, in petitioner's name, was first telephoned to Western by either Supply's procurement department or Turnbow's secretary on December 8, 1948. The Western salesman who received the order filled out an order form in the name of Supply, but petitioner's name was added later.

On the day that the order was telephoned to Western, Supply prepared an export purchase order for the cans addressed to petitioner. Supply had used the same form in preparing its orders theretofore forwarded directly to Western. Peti-

tioner then forwarded to Western a written confirmatory order in its name. Petitioner's check dated December 16, 1948 extinguished the obligation to Western for the cans. Supply paid an invoice on petitioner's letterhead for the cans at a 5 per cent increase in price within 10 days of the invoice date.

In 1949, petitioner utilized the same recording and routing of orders for cans needed by Supply on 37 occasions. Petitioner derived the proceeds reported as income on its 1949 returns because it billed Supply at 5 per cent more than it was billed by Western. In 1950, petitioner utilized the same recording and routing on approximately 48 occasions and derived the reported profit from sales transactions from this operation.

There was no business purpose connected with the can transactions engaged in by petitioner. It never used its Nevada office in these operations. It carried no inventory of cans and ordered no cans other than those used by Supply. In every instance in which Supply acquired cans in this way, it paid petitioner within 10 days of petitioner's payment to Western.

After 1950, Supply recommenced ordering and purchasing of cans directly from Western.

During 1948, 1949 and 1950, petitioner was not engaged in trade or business within the United States.

Opinion

Business has been defined as "[t]hat which occupies the time, attention, and labor of men for the purpose of a livelihood or profit." Flint v. Stone

Tracy Co., 220 U.S. 107, 171. "The word, notwithstanding disguise in spelling and pronunciation, means busyness; it implies that one is kept more or less busy, that the activity is an occupation." Snell v. Commissioner, (C.A. 5) 97 F. 2d 891, 892, affirming B.T.A. Memorandum Opinion. "* * * it is essential that livelihood or profit be at least one of the purposes for which the employment is pursued, in order to bring it within the accepted definition of the word * * *." Deering v. Blair, (C.A., D.C.) 23 F. 2d 975, 976, affirming 5 B.T.A. 1055. Transactions which are not entered into for profit and which do not and in all probability cannot result in a profit, particularly where such transactions are of an isolated and noncontinuous nature, will not dictate the conclusion that one is engaged in business. And that, notwithstanding petitioner's categorical statement to the contrary in its brief, we view as the only issue.

Petitioner claims the tax status of a resident foreign corporation in order to receive certain tax benifits. For this it must have been "engaged in business" in the United States.[1] The desired deductions and credits Congress could extend or withhold. New Colonial Co. v. Helvering, 292 U.S. 435. Our problem is to determine congressional intent with

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[1] Internal Revenue Code of 1939.

"Sec. 231. Tax on Foreign Corporations.

"(b) Resident Corporations.—A foreign corporation engaged in trade or business within the United States shall be taxable as provided in section 13 and section 15."

respect to the relevant statutory provision as applied to the demonstrated facts.

As to the legislative frame of mind there seems little room for doubt. The enactment of the 1942 amendment was accompanied by an unequivocal statement that a foreign corporation merely servicing its investments in this country was not the type of taxpayer to which the section was intended to refer.[2]

The detailed analysis submitted by petitioner of all of its transactions during the years in controversy shows that only items accounting for a fraction of 1 per cent of petitioner's total income represent those which by any stretch of the imagination could be considered business. See Linen Thread Co., Ltd., 14 T.C. 725. Such transactions resulted in no substantial gain, and considering the time spent on them they could not, and in several instances actually did not, result in even a nominal net profit.[3]

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[2] "A tendency has arisen, principally on the part of foreign corporations which are substantial holders of the stock of domestic corporations * * * to attempt to establish that they have an 'office or place of business' within the United States and hence secure the very different tax treatment accorded taxpayers * * * Since such corporations * * * engage in no other economic activities in the United States, they can not be said to be engaged in trade or business within the United States." H. Rept. No. 2333, 77th Cong., 1st Sess., 1942-2 C.B. 372, 449.

[3] Petitioner's so-called "right" to conduct itself as it chooses is not now in controversy. The question is what are the effects of such conduct upon petitioner's tax liability.

In this case we think their character was such that they cannot be regarded as business transactions within the quoted definition because of their obvious lack of business purpose. Thacher v. Lowe, (S.D., N. Y.) 288 F. 994; Deering v. Blair, supra.

Petitioner relies on several cases for the proposition that the question is not what was petitioner's business, but whether what it did was in fact what it appeared to be in form. E.g., W. P. Hobby, 2 T.C. 980; Clara M. Tully Trust, 1 T.C. 611; John Junker Spencer, 19 T.C. 727. But these are authorities in an area which we regard as foreign to the present issue. There the question of purpose was significant in order to determine whether or not to give effect to the transactions in question, not in order to determine whether petitioner was, in fact, Jan Casimir Lewenhaupt, 20 T.C. 151, affirmed per curiam (C.A. 9) 221 F. 2d 227, "engaged in business." See Marian Bourne Elbert, 45 B.T.A. 685.

There are at least two factual reasons for answering that question here in the negative. The first is the element of purpose, in view of the difficulty of assuming that one would be engaged in business who had no "business purpose" but whose conduct, as apparently admitted by petitioner, was dictated not by a business objective but purely by a desire to save taxes. Gregory v. Helvering, 293 U.S. 465; Linen Thread Co., Ltd., supra. In this view we may regard the transactions as "substantive" in the sense that the operations described were actually performed, just as they were so regarded in the Gregory case, without concluding that they consti-

tuted the conduct of a business, that they rendered the petitioner "busy," or that they were engaged in for a livelihood or profit.

Second, for a taxpayer to be engaged in business, there must be a fair degree of activity, scope and continuity in the transactions undertaken. See Ehrman v. Commissioner, (C.A. 9) 120 F. 2d 607, affirming 41 B.T.A. 652, certiorari denied 314 U.S. 668; Snell v. Commissioner, supra. The record as a whole and petitioner's summary of the transactions to which we have already referred demonstrate conclusively that there was neither consistency nor frequency in those few isolated activities which could, within the express legislative intent, otherwise have been the kind of business in which Congress expected a foreign corporation to engage for purposes of the present issue. And it is not without significance that petitioner itself on its tax return described its activity as "Investment."

Upon all the evidence, we conclude not only that petitioner has failed to carry its burden of showing that it was engaged in business in the United States, but that, in fact, the record affirmatively shows the opposite to be true.

Decision will be entered for the respondent.

Served and Entered Sept. 3, 1957.

The Tax Court of the United States
Washington

Docket No. 55212

CONTINENTAL TRADING INC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed August 30, 1957, it is

Ordered and Decided: That there are deficiencies in income tax as follows:

Year	Deficiency
1948	$208,300.59
1949	151,559.71
1950	114,468.53

Entered September 4, 1957.

[Seal] /s/ CLARENCE V. OPPER,
Judge.

Served and Entered September 6, 1957.

[Title of Tax Court and Cause.]

MOTION TO VACATE DECISION

The Petitioner, above named, by its counsel, Messrs. M. W. Dobrzensky and S. H. Dobrzensky, hereby moves for an Order of this Court vacating and setting aside this Court's Decision (ordering and deciding that there are deficiencies in income tax as follows:

Year	Deficiency
1948	$208,300.59
1949	151,559.71
1950	114,468.53)

entered on September 4, 1957, for the reason that said Decision is based upon the Court's Memorandum Findings of Fact and Opinion, dated August 30, 1957, which is not based upon the evidence and which is erroneous in law.

There is being filed contemporaneously herewith a separate Motion for Reconsideration of said Decision, in connection with which this separate Motion to Vacate said Decision is made. Reference is hereby made to said Motion for Reconsideration for a statement of the particulars of said errors respecting the evidence and law.

If, in the discretion of the Court, this Motion is placed upon the Motion Calendar for argument, then it is requested that the same be set on or after October 23, 1957, at the convenience of the Court, for the reason that said counsel have a matter on the trial calendar of the Division to sit in San Francisco, California, for call on September 30, 1957.

Dated at Oakland, California, September 23, 1957.

/s/ M. W. DOBRZENSKY,
/s/ S. H. DOBRZENSKY,
Attorneys for Petitioner.

Served and Entered Oct. 1, 1957.

Stamped: Denied. Oct. 1, 1957. Clarence V. Opper, Judge.

[Endorsed]: T.C.U.S. Filed Sept. 24, 1957.

[Title of Tax Court and Cause.]

MOTION FOR RECONSIDERATION

Comes Now the above named Petitioner by its counsel, Messrs. M. W. and S. H. Dobrzensky, and moves the Court for reconsideration and vacation of the Court's Memorandum Findings of Fact and Opinion herein filed August 30, 1957, a copy of which was received by Petitioner's counsel on September 10, 1957.

Said motion is made on each of the following grounds: that

I. The Decision Is Erroneous In Law;

II. The Decision Is Not Based Upon and Is Contrary to the Evidence.

In support of this motion, Petitioner alleges and shows:

I.

The Decision Is Erroneous In Law

A. The Court has erroneously stated the Legislative purpose in the enactment of the 1942 amendment to § 231(b) of 1939 IRC.

1. The Court's Opinion misstates and utterly misconstrues what it calls the "Legislative Frame of Mind" in the 1942 amendment of 1939 IRC § 231 (b). It says that the enactment

> "was accompanied by an unequivocal statement that a foreign corporation Merely Servicing Its

> Investments In This Country* was not the type of taxpayer to which the section was intended to refer."

There Is No Such Statement In The Legislative History. The Opinion then cites and quotes from the House Report in 1942-2 C. B. 372, 449.

2. One has but to look at this reference to see that the House Committee Report contained no such statement and that the Court failed to recognize what was the expressly declared purpose of the amendment.

3. The House Report first points to the then existing law under which foreign corporations were divided into two classes:

> (a) those not Engaged In Trade or Business within the United States and Not Having an Office or Place of Business Therein,
>
> and
>
> (b) those Engaged In Trade or Business within the United States or Having an Office or Place of Business Therein.

Particular attention is directed to the Alternative statement in (b), supra, and to the fact that, Prior to the amendment, a foreign corporation Merely by Having An Office or Place of Business In the United States could qualify as a Resident foreign corporation and thus receive More Favorable Tax Treatment. The House Report then continues (1942-2 C. B. p. 450):

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* All emphasis herein is by Petitioner.

> "* * * Since such corporations * * * Engage In No Other Economic Activities In the United States, they cannot be said to be engaged in trade or business within the United States."

4. Then the Report continues with this expression of its views which show the True Purpose of the amendment (p. 451):

> "It Appears to Your Committee to be in the interest of good administration to Establish But One Test in ascertaining the classification of foreign entities, namely, Whether or Not It Is Engaged in Trade or Business Within the United States * * *"

Thereupon, §231(b) was amended to read as follows:

> "(b) Resident Corporations. A foreign corporation engaged in trade or business within the United States shall be taxable as provided in §13 and §15."

5. Thus, After the amendment, a foreign corporation having large dividend income from U. S. stocks could Not qualify as a Resident foreign corporation Merely by maintaining an office or place of business here. It will be recalled that the House Committee Report (1942-2 C. B. 412), referring to the law Before the 1942 amendment, said:

> "* * * In many cases the advantages are such that it is profitable to Maintain an Office in the United States, or a Semblance of One, with No Purpose of transacting any business in this country. §143 of the bill, therefore, Amends

several provisions of existing law To Make Engaging in Trade or Business here the Sole Criterion."

6. In addition to the foregoing, the Senate Report (1942-2 C. B. 546) reiterates the Purpose to adopt a single test for determining whether or not a foreign corporation is Resident:

> "Your Committee have agreed to the House provision Requiring a Nonresident Alien or a Foreign Corporation To Be Engaged in Trade or Business Within the United States in Order To Be Taxable Like American Citizens or Domestic Corporations with respect to the income derived from sources within the United States. Under the present law, this privilege is extended to a nonresident alien individual or a foreign corporation Which Has an Office or Place of Business in the United States, Even Though It May Not Be Engaged in Business Therein. The provision in the House Bill is applicable only with respect to taxable years beginning after December 31, 1941. With respect to prior taxable years, the provisions of existing law, which afford such treatment to a corporation having an office or place of business in the United States will continue even though such corporation is not engaged in trade or business within the United States."

7. The purpose of the 1942 amendment is clear and that purpose was Not as stated in the Tax Court's opinion. Its purpose was to Require Some-

thing More than maintaining an office to qualify as a Resident foreign corporation.

B. The Court's Opinion Overlooks an Earlier Decision Holding That the Enactment by Congress of §231(b) Was an Invitation to Foreign Corporations To Engage in Trade or Business in the United States and Thus Qualify as a "Resident" Foreign Corporation Entitled to More Favorable Tax Treatment Than a "Non-Resident" Foreign Corporation.

1. One needs only to look at §231(a) and (b) to observe that a Resident foreign corporation is taxed On a More Favorable Basis than a Non-resident foreign corporation.

2. If it be held, as the Court's Opinion holds, that a foreign corporation which Deliberately and Intentionally engages in trade or business in the United States to gain the tax advantage offered by §231(b) and Thus To Save Taxes, then The Will of Congress Is Defeated.

3. In its Opinion at page 12, referring to purpose, the Tax Court says that:

> "* * * In view of the difficulty of assuming that one would be engaged in business which had no 'business purpose' but whose conduct, as apparently admitted by Petitioner, was Dictated Not By a Business Objective But Purely By a Desire to Save Taxes * * *"

4. The Opinion overlooks what was so pointedly said in Scottish American Investment Co., Ltd., 47

BTA 474, (aff. 132 Fed. 2d, 419 and 323 U. S. 119) where, at page 482 the Board of Tax Appeals said:

> "Even if it be true that Tax Considerations prompted the opening of the offices in the United States, it would Be of No Particular Significance. Congress Extended the Invitation to foreign corporations to establish an office or place of business in this country. And So Long As the Office Is Not a Sham But Is a Place for the Transaction of Business, Petitioners Qualify under Section 231(b) * * *"

At this time §231(b) remained unamended and the Mere Establishment of an Office Was Sufficient to gain for the foreign corporation the Preferential Tax Treatment accorded a Resident foreign corporation, which could establish itself as such Merely By Opening an Office.

5. Since such a proffered Invitation was accepted by Petitioner, there could be nothing wrong in a Deliberate and Intentional Acceptance of that invitation.

6. Furthermore, there is a long line of well-considered cases holding, where the question is whether or not a corporate entity should be recognized as a jural person, that it Is Immaterial That the Predominant Motive of the Incorporators Was To Minimize Taxes. Sun Properties v. U. S. (CA 5) 220 Fed. 2d 171; Langdon L. Skarda, 27 T. C. 15; Freidlander Corp. v. Comm. (CA 5) 216 Fed. 757; Polak's Frutal Works, Inc., 21 T. C. 973; Twinoaks Co. v. Comm., (CA 9) 183 Fed. 2d 385; Riddlesbar-

ger v. Comm., (CA 7) 200 Fed. 2d 165; John Junker Spencer, 19 T. C. 726.

7. It is beyond any possibility of doubt but that each and every transaction of Petitioner in the United States during the years in question was Actual and Real and Not Sham. The stipulated facts cannot be ignored.

8. As the Supreme Court held in Moline Properties, Inc. v. Comm., 319 U. S. 436, whether or not a corporation should be disregarded as Unreal or a Sham seems to rest upon whether its creation Was Followed by Business Activity.

9. The Court's Opinion with reference to the matter of Tax Saving appears to be completely out of line with a long list of decisions.

10. Herbert v. Riddell, (DC Cal.) 103 Fed. Supp. 369, under the caption The Taxpayer's Right To Reduce Tax Liability, lists the principal authorities and says:

> "The Supreme Court of the United States Ever Since the Question Came Before It in 1874 has insisted that a taxpayer may legally and honorably take means to minimize his taxes * * *"

11. Montgomery v. Thomas, 146 Fed. 2d 76 at page 81 holds that Legal Transactions Cannot Be Upset Merely Because Parties Have Entered Into Them for the Purpose of Minimizing or Avoiding Taxes Which Might Otherwise Accrue.

12. The Tax Court is John Junker Spencer, 19 T. C. 727 at page 735 says:

"There is a well established principle in tax law that a Taxpayer May Legally and Honorably Take Any Steps Approved by the Law To Arrange His Affairs So As To Minimize His Tax Liability. United States v. Isham, 17 Wall. 496; Gregory v. Helvering, 293 U. S. 465. The Motive of Tax Avoidance for Entering Into a Particular Transaction Has Never Been Held a Basis for Liability Unless the Transaction Itself First Established Such Liability Without It. Chisholm v. Commissioner, 79 F. 2d 14. That is to say, the transaction must Actually Accomplish in Substance That Which It Purports To Do in Form. 'It is axiomatic that the reach of the income tax law is not to be circumscribed by refinements of title * * *' See Paul G. Greene, 7 T. C. 142. Mere passage of title to income-producing property unattended by a complementary shift of entire economic benefits of ownership, both direct and indirect, will not suffice to relieve the transferor of liability for tax on the future income therefrom. Helvering v. Clifford, Jr., 309 U. S. 331. The question ultimately to be Answered in Determining the Reality of a Transaction for tax purposes was succintly stated by the Court of Appeals in the Chisholm case as:

"'* * * whether the transaction under scrutiny Is in Fact What It Appears To Be in Form; a marriage may be a joke; a contract may be intended only to deceive others; an agreement may have a collateral defeasance. In such cases the transaction as whole is different from its appearance. True, it

is always the intent that controls; and we need not for this occasion press the difference between intent and purpose. We may assume that purpose may be the touchstone, But the Purpose Which Counts Is One Which Defeats or Contradicts the Apparent Transaction, Not the Purpose To Escape Taxation Which the Apparent, But Not the Whole, Transaction Would Realize * * *' "

And, furthermore, the Tax Court in its same opinion, says very significantly at page 736:

"When a taxpayer seeks to achieve a desired business or tax result, He Has Freedom of Choice As to the Form in Which He Will Channel His Business. Higgins v. Smith, 308 U. S. 473. If the taxpayer Actually Carries On Business in the form so chosen, the Government may Not deprive him of the benefits which flow therefrom unless such form be found to be but a fiction or a sham. Higgins v. Smith, supra; Rhode Island Hospital Trust Co., 7 T. C. 211. Thus, when a corporate form for carrying on business is Adopted and There Follows an Exercise of Corporate Powers and the Doing of Some Business in the Ordinary Sense Regardless of Quantum, the Corporate Identity Constitutes a Separate Taxable Entity and May Not Be Disregarded. Moline Properties, Inc. v. Commissioner, 319 U. S. 436 * * *"

13. If the Court's Opinion would follow these clearly defined principles and apply them to the undisputed facts of the case at bar, it would necessarily have to arrive at the conclusion that the Peti-

tioner, in accepting the Congressional invitation to engage in trade or business within the United States and thus avail itself of preferential tax treatment, was acting with complete legal propriety and should be regarded as having been engaged in trade or business within the United States notwithstanding any desire to avail itself of the proffered tax advantages.

C. The Court's Opinion Violates the Rule Which Requires That It Look at the Composite Picture of Petitioner's Activities As an Integrated Whole and Not Analyze Each Activity Apart.

1. The Opinion has erroneously considered the activities of Petitioner Separately and has analyzed its activities Apart.

2. The proper approach to an evaluation of the activities of the Petitioner is as stated in Helvering v. Scottish American Investment Co. (CA 4) 139 Fed. 2d 419 (affirmed 323 U.S. 119) affirming the Board of Tax Appeals in 47 BTA 474. At page 422 the Court of Appeals said:

"We agree, too, with the Board that the proper approach to this problem is Not To Consider Each Activity and Power Separately and To Analyze It Apart so as to determine whether that one activity or power, considered alone, can be construed as casual or incidental. But the Composite Picture of These Activities and Powers Must Be Viewed As an Integrated Whole and a Solution Must Be Sought Accordingly. The strength of a rope is not

that of a single strand, or as Mr. Justice Holmes aptly said in Edward v. Chile Copper Co., 270 U.S. 452, 455, 46 S. Ct. 345, 346, 70 L. Ed. 678: 'We cannot let the fagot be destroyed by taking of each item of conduct separately and breaking the stick. The Activities and Situation Must Be Judged As a Whole.' "

3. As presently will be shown, the Court's Errors of Law are closely interwoven with its Disregard of the Evidence and particularly of the Stipulated Facts.

4. Had the Court looked objectively at the Composite Picture of Petitioner's activities, it would have seen that the composite picture exhibited all necessary elements of Progression, Continuity and Sustained Activity.

(a) Exhibit XXVIII attached to the Stipulation lists Petitioner's 91 actual purchases of cans from Continental Can Company for a total cost of $177,-980.76 and the resale thereof for $183,984.74 At a Profit. Item 1, of this list of 91 transactions is dated December 16, 1948; and Items 2 to 38 (37 transactions in all) were purchases which occurred during the months of January, April, May, June, July, August, September, October, November and December of 1949; Items 39 to 91 (representing 53 transactions in all) occurred during the months of January, February, March, April, May, June, July, August, September, October, November, and December, 1950.

(b) These Stipulated Facts clearly show Continuity and Substantiality in the 91 actual transactions which Produced a Profit to petitioner.

(c) Exhibit IV attached to the Stipulation is a further excellent index of the Continuity and Substantiality of Petitioner's commercial and financial activities in the United States. This is a list of 179 checks, totalling $2,209,036.52, which Petitioner drew, Month by Month, against its account at First National Bank at Reno, Nevada. The 179 checks were drawn For Business, Commercial and Financial Purposes, Month by Month, starting March 18, 1948, to and including December 30, 1950. This Exhibit Speaks for Itself.

(d) Exhibit V attached to the Stipulation is another informative exhibit which further shows the Continuity and Substantiality of Petitioner's activities in the United States. This is a list of 19 checks, totalling $2,065,987.97, which Petitioner drew against its account with Bank of America National Trust and Savings Association for Business, Commercial and Financial Purposes, during the period May 22, 1948 to and including September 15, 1950.

(e) In addition to these exhibits, which so clearly show the Continuity and Substantiality of Petitioner's activities in the United States, is the further Stipulated Fact that between May 21, 1948 and January 3, 1950 the Petitioner, through its President, here in the United States negotiated and Made Seven Loans Aggregating $6,800,000 in Principal Amount.

(f) Also in December of 1949, Petitioner sold 55,000 shares of Servel stock for $9.50 per share.

(g) On July 12, 1948 Petitioner purchased for $46,212.75, and resold at a loss, one carload of anhydrous milk fat.

(h) During this period in the United States the Petitioner was Regularly Making Interest and Principal Payments on Its United States Bank Loans and Paying All of Its Incidental and Operating Expenses.

(i) And finally, it was the Uncontradicted Testimony of Mr. Turnbow, President of Petitioner, that Petitioner proposed to finance the establishment of recombined milk plants in foreign countries and during the years in question the principal activity in which he was engaged on behalf of Petitioner was an overall program having in mind the establishment of milk plants in foreign countries with Petitioner as the financial company who would underwrite these deals. The countries dealt with were Abyssinia, Peru, Venezuela, Panama, Israel, Italy, Turkey, India and Philippine Islands. He further testified that Most of These Negotiations for foreign built plants Were in Oakland, California and that the plans for establishing these plants were frustrated when Petitioner ascertained the inconvertibility of local currency of the countries in which it was proposed to establish the plants into United States dollars.

5. This failure of the Court to look at the Com-

posite picture of Petitioner's operations is a serious error of law.

D. The Opinion, in Dealing With Petitioner's Sales of Cans, Insisted on the Presence of a Business Purpose Independent of the Taking of a Gain, Contrary to the Rule Announced by the Court in an Earlier Case.

1. In its Opinion (p. 9) the Court says: "There Was No Business Purpose Connected With the Can Transactions."

2. The Opinion overlooks what the Court said in Hobby 2 T. C. 980:

"* * * However, we would be most reluctant to impose a court-made requirement Of a Business Purpose Independent of Taking a Gain or Loss in determining the genuineness of sales in general, since it is common knowledge that vast numbers of sales have been made and are still being made for the purpose of taking gains and losses at times Which Provide the Optimum Tax Benefits."

3. Attention is called to Sun Properties v. U. S., (CA 5) 220 Fed. 2d 171, where, at page 174, it is said:

"Nor does the fact that this transaction May Not Have Any Business Purpose Other Than Saving Taxes, rationally imply that it was not a sale. No cases require that a Sale have any business purpose beyond that of realizing a capital gain. See Hobby, 2 T.C. 980."

4. In light of the foregoing, the Court clearly erred in determining that a business purpose was required in connection with the 91 undeniably actual and substantial can transactions which did yield a profit.

5. Furthermore, the Court erred, as previously pointed out, in considering this activity Apart and not a part of the Composite picture of Petitioner's operations.

Failure of the Court To Follow the Law and to look at the Composite picture of Petitioner's activities during the years in question and to view them As a Whole and Not Separately And Apart is responsible for the Court's refusal, Contrary to the Stipulated Facts, to recognize

—the Continuity of Petitioner's activities

—the Quantum and Substantiality of its activities

—the Reality of its activities.

Failure of the Court To Follow the Law and to recognize that the enactment of §231(b) was an Invitation by the Congress to foreign corporations to do the very thing that Petitioner did, viz. to Engage in Trade or Business in the United States and thus Effect a Proffered Tax Saving by being taxed at the Lower Rates applicable to Resident foreign corporations, as compared to the higher rates applicable to Non-Resident foreign corporations, lead the Court to the erroneous disregard of Petitioner's many actual, lawful, substantial and

continuous business, financial and commercial activities in the United States.

Failure of the Court To Follow the Law is responsible for its erroneous assertion that the Business (which it was Stipulated that Petitioner Did actually transact) required an additional "Business Purpose" when the law is clear that the realization of whatever gain or loss flows from the transaction is all the purpose that is required.

II.

The Decision Is Not Based Upon and Is Contrary to the Evidence

In Addition to its failure to view the Composite picture of Petitioner's activities, as pointed out in the first part of this Motion, the Court's Opinion overlooks or ignores substantial items of Petitioner's activities.

A. The Court's Opinion Has Erroneously Overlooked or Ignored Substantial Items of Real, Substantial, Continuous Business Activities of Petitioner and Has Failed to Evaluate Them As a Part of the Composite Picture.

1. In its Opinion, at page 4 thereof, the second sentence of the first paragraph declares:

> "Petitioner never undertook any activity in connection with the establishment of such recombined milk plants and never used its assets and borrowings for this or any related purpose."

Petitioner's President, Mr. Grover D. Turnbow, gave clear and uncontradicted testimony that he, as Petitioner's President, devoted considerable time during the three years in question in an effort to establish projects for the construction and operation of recombined milk plants. The evidence clearly shows that assets of Petitioner were used in this purpose.

2. A brief review of the testimony discloses the uncontradicted, substantial and convincing evidence disregarded by the Court. Thus, (quotations are from the Transcript at the page indicated):

(P. 117):

"Q. During the three years of 1948, 1949 and 1950 what was the principal activity in which you engaged as president of Continental; that is, during those years?

"A. Well, it was tied up with an overall program of which — of having in mind the establishment of plants in foreign countries, and Continental Trading being the financial company that was to underwrite these deals — and, as I say, deals— plants in these various countries.

"Q. Those were milk plants, is that correct?

"A. Yes, recombined milk plants.

"Q. What were some of the countries that you dealt with in those cases, if you recall?

"A. Oh, Abyssinia, Peru, Venezuela, Panama, Israel, Italy — considerable time spent in Italy— Turkey, India, Philippine Islands. Many, many countries we visited and worked with."

(P. 120)

"Q. Now, you mentioned a considerable number of countries with whom you discussed or dealt with with respect to possibilities of establishing plants. In those cases Did Negotiations Take Place in Your Office in Oakland, or Elsewhere?

"A. Part of the time, part of the time; but Some of Them in Oakland, a Good Many of Them in Oakland. As a Matter of Fact, I Suppose in the United States Most of Them Were in Oakland, but many times we went to these foreign countries and negotiated right on the ground.

"Q. Now——

"A. At their request, as a rule. Generally you will find that some requests, a letter or some telephone—something, you will find requests for many of these places for negotiations."

(P. 122)

"Q. I take it that none of these plans that you worked on during the years 1948, 1949 and 1950 materialized because of its inconvertibility?

"A. That's correct. Without that you can't make it work at all."

(P. 143)

"Q. Would it have not been possible for you, through your own enterprises, to have conducted these activities?

"A. I didn't have enough money. Outside of that it would have been all right."

B. In Numerous Instances the Court Disregarded Stipulated Facts and Uncontradicted Testi-

mony and Drew Inferences Not Warranted by the Facts.

1. At page 3 of the Opinion, the Court found that "Prior To and during the years here involved, the program failed * * *" due to inconvertibility of foreign currency and the instability thereof, whereas the testimony clearly shows that it was Following the efforts of the years 1948, 1949 and 1950 that the program failed as the problem of inconvertibility and instability was Then encountered in various of the numerous countries in which negotiations were being had by Petitioner.

2. At pages 3 and 4 of the Opinion, the Court finds that "Petitioner represented the incorporation of part of the vast holdings of Axel Wenner-Gren, * * *" and that "after petitioner's incorporation, it assumed Wenner-Gren's liabilities to various banks, having acquired its stock in the Electrolux and Servel corporations, which it thereupon pledged as security for loans." The basis for these assertions appears to come from respondent's opening statement. The fact is that Wenner-Gren transferred valuable securities to Petitioner In Exchange for Its Stock and as a part of the Same Transaction and at that time Petitioner assumed the indebtedness for which the securities were then pledged. It will be observed that the Court has stated this proposition in a manner not warranted by the facts.

3. At pages 3 and 4, the Court states that Petitioner paid no rent for its Oakland office and that it had no paid employees in the United States, and

apparently draws some significance therefrom, whereas the fact is that while Petitioner paid no rent directly for the Oakland office and "had no paid employees" (outside of Nevada Agency and Trust in Reno), its attorneys and its President, Mr. Turnbow, Did Furnish Secretarial and Other Assistance and Offices and of His Own Services for which he received a settlement consisting of 5,000 shares of stock worth around $55,000.00 and $50,000.00 in cash.

4. At page 6, the Court finds that Wenner-Gren used the proceeds of loans in the acquisition of the telephone company stock in Mexico, A Matter That Does Not Appear Anywhere in the Evidence or Stipulation. On the same page, the Court states that the proceeds of these loans were used to pay indebtedness of Wenner-Gren, whereas in fact, they were used to pay debts of Petitioner, some of which were assumed in connection with the exchange of stock at the time of its creation.

5. At page 7, the Court states that the funds borrowed were in the main used by Wenner-Gren, whereas the fact is, they were used by Petitioner corporation, whether or not, as principal shareholder, Mr. Wenner-Gren may have been influential in the manner of their use.

6. At page 8, the Court refers to alleged "Orders" by telephone of cans, whereas the evidence shows, in the cross examination of the witness, Amand, the Western Can Company employee, Not that there were telephone orders, but that there was

Telephonic Notification in Advance of the Written Orders, which gave Western Can an opportunity to arrange its production to take care of an order when it came. The statement that these were "orders by telephone" is largely based upon statements made by counsel for the respondent.

7. At page 8, the Court uses the expression "in Petitioner's name" which is an equivocal statement in view of the fact that the Petitioner either acted through one of its authorized agents or a non-authorized person purported to act in the name of the corporation, and did not do so.

This motion is based upon all and singular the pleadings, stipulation and transcript in this case and upon the Court's aforesaid Memorandum Findings of Fact and Opinion.

Wherefore, Petitioner prays that the Court reconsider its said findings of fact and opinion and give consideration to the matters of law and fact aforesaid and find that Petitioner, during the years in question was engaged in trade and business in the United States and qualified as a resident foreign corporation.

This motion is accompanied by a separate motion to vacate and set aside the Decision, entered September 4, 1957, and based on said Memorandum Findings of Fact and Opinion.

If, in the discretion of the Court, this Motion is placed upon the Motion Calendar for argument, then it is requested that the same be set on or after

October 23, 1957, at the convenience of the Court, for the reason that said counsel have a matter on the trial calendar of the Division to sit in San Francisco, California, for call on September 30, 1957.

Dated at Oakland, California, September 23, 1957.

/s/ M. W. DOBRZENSKY,
/s/ S. H. DOBRZENSKY,
Attorneys for Petitioner.

Served and Entered Oct. 1, 1957.

Stamped: Denied. Oct. 1, 1957. Clarence V. Opper, Judge.

[Endorsed]: T.C.U.S. Filed Sept. 24, 1957.

[Title of Tax Court and Cause.]

MOTION FOR LEAVE TO FILE MOTION TO VACATE DECISION, TO REOPEN THIS PROCEEDING, AND TO TAKE FURTHER TESTIMONY

Comes Now the petitioner through its counsel, Fred R. Tansill, and respectfully moves this Court for leave to file motion to vacate decision, to reopen this proceeding and to take further testimony.

In support of this motion, it is averred that:

1. There is being filed together with this motion a motion to vacate decision, to reopen this proceeding and to take further testimony.

2. The decision in this proceeding was filed on September 4, 1957.

3. The undersigned has reason to believe that there is newly discovered evidence relating to the issue decided in this proceeding which, had such evidence been presented to the Court, would have resulted in a decision in favor of the petitioner on the issue in this proceeding. The evidence referred to relates to the circumstances surrounding the formation of the petitioner and the purposes for which it was formed together with certain activities of the petitioner which could constitute a sufficient degree of activity so as to qualify the petitioner as "engaged in a trade or business in the United States."

4. It is understood that this motion will be set for argument on a motion calendar by this Court. This matter has been discussed with counsel for the respondent and, respondent's counsel has indicated no objection to setting such an argument on Wednesday, November 27, 1957.

Wherefore, it is prayed that this motion be granted.

Respectfully,

/s/ FRED R. TANSILL,
Counsel for the Petitioner.

Of Counsel:
Leon, Weill & Mahony.

Served and Entered Dec. 5, 1957.

Stamped: Denied. Nov. 27, 1957. Clarence V. Opper, Judge.

[Endorsed]: T.C.U.S. Filed Nov. 19, 1957.

[Title of Tax Court and Cause.]

MOTION TO VACATE DECISION, TO REOPEN THIS PROCEEDING, AND TO TAKE FURTHER TESTIMONY

Comes Now the petitioner through its counsel, Fred R. Tansill, and respectfully moves this Court to vacate the decision filed in this proceeding on September 4, 1957 and to reopen this proceeding for the purpose of taking further testimony.

In support of these motions, it is averred that:

1. The Memorandum Findings of Fact and Opinion of this Court in the above-entitled proceedings was filed on August 30, 1957.

2. The decision in this proceeding was filed on September 4, 1957.

3. The undersigned was retained as counsel by the petitioner on October 21, 1957 to prosecute an appeal from the decision of this Court to the United States Court of Appeals for the Ninth Circuit.

4. Such an appeal would have to be filed not later than December 4, 1957.

5. In the process of reviewing the files relating to this proceeding with reference to filing the appeal above-mentioned, the conclusion has been reached that not all of the available facts were presented with reference to the issue decided by the Court. In addition, the testimony of Axel L. Wenner-Gren, the principal party at interest, was neither sought nor presented to the Court. Wenner-

Gren is and was available to testify and could testify of his own knowledge to certain relevant facts in connection with the issue in the proceeding. See the attached affidavit of Axel L. Wenner-Gren.

6. It further appears to the undersigned that in some instances the facts presented were not presented in the most favorable light. In this connection see the affidavit of Birger Strid, attached.

7. It is believed that a more complete, accurate and informative presentation of relevant facts could be made if these motions were granted and the decision vacated and the proceeding set for the taking of further testimony.

Wherefore, it is requested that these motions be granted.

Respectfully,

/s/ FRED R. TANSILL,
Counsel for Petitioner.

Of Counsel:
Leon, Weill & Mahony.

AFFIDAVIT

City of New York,
County of New York,
State of New York—ss.

I, Axel L. Wenner-Gren, being duly sworn, depose and say as follows:

I am a citizen of Sweden and currently a resident of Mexico City, D.F., Mexico;

I am also the person primarily interested in the decision of the Tax Court of the United States in Continental Trading, Inc., Docket No. 55212, in which decision was entered on September 4, 1957;

I was a Director and the original founder of that company;

Continental Trading, Inc. was formed by me in 1947 in furtherance of my plans for international distribution of dehydrated milk products in part under the auspices of UNICEF, an adjunct of the United Nations;

The function of Continental Trading, Inc. was dual in that it was to function as a financial reservoir of international milk operations and was in addition to serve as a purchasing and selling agent of dehydrated milk products in the United States and elsewhere throughout the world;

I have read the opinion of the Tax Court of the United States with reference to the above mentioned Continental Trading, Inc. case and I have the impression that an incomplete and in part inaccurate presentation of facts was given in that case;

I was not advised of the pendency or hearing held in the Tax Court of the United States in this connection nor was I invited to testify as a witness;

Had I been invited to testify as a witness and had I testified, I could have been able to present additional evidence bearing upon the issues presented to the Court.

In addition to my testimony, other possible wit-

nesses who have personal knowledge of the purposes and activities of Continental Trading, Inc. could be made available for the Court.

/s/ ALEX L. WENNER-GREN.

Subscribed and sworn to before me this 15th day of November, 1957.

/s/ BEATRICE S. ELKIN,

Notary Public, State of New York. No. 41-1100335. Qualified in Queens County. Cert. filed with New York Co. Clerk. Commission expires March 30, 1959.

AFFIDAVIT

City of New York,
County of New York,
State of New York—ss.

I, Birger Strid, being duly sworn, depose and say as follows:

I am a citizen of Sweden and a resident of Sweden;

I have been connected with various enterprises owned, operated and conducted by Axel L. Wenner-Gren since 1940.

During the period of my association; namely, since 1940, my activities have been confined to the milk and milk products enterprises. Among other things, I am Chairman of the Board of Swedish Milk Products which is the largest dry milk enterprise in Sweden. This enterprise is owned by Axel L. Wenner-Gren.

Commencing in 1938, the company above men-

tioned inaugurated a program of milk dehydration and the production and exportation of such products. I have been intimately connected with that program since my joining the company and still am connected with that activity today.

After the end of World War II, the Swedish Milk Company embarked upon a program of European distribution of dehydrated milk products in connection with various governments in Europe and relief organizations. The Swedish Milk Company was a technical consultant and adviser to UNICEF, an adjunct of the United Nations, in connection with their European Milk Conservation Project, and supplier for their world wide distribution of dry milk products to deficit areas.

My activities in these connections have required that I become and remain intimately familiar with the international market for milk and dehydrated milk products.

Commencing in 1948 and continuing in an accentuated degree in 1949 and 1950, there was a tremendous oversupply and overproduction of milk and dehydrated milk products in the United States. As a result of United States Government programming, surplus milk and milk products were distributed more or less free of charge throughout the deficit areas of the world. The result was that it was not feasible to continue the milk dehydration program of Continental Trading, Inc. in the United States during the years mentioned. I have personal knowledge of the problems and operational methods envisaged for Continental Trading, Inc. through my

connection with Mr. Wenner-Gren and his other milk enterprises in Sweden and Europe.

/s/ B. STRID.

Subscribed and sworn to before me this 18th day of November, 1957.

/s/ BEATRICE S. ELKIN,

Notary Public, State of New York. No. 41-1100335. Qualified in Queens County. Cert. filed with New York Co. Clerk. Commission expires March 30, 1959.

Served and Entered Dec. 5, 1957.

[Endorsed]: T.C.U.S. Lodged Nov. 19, 1957.

[Title of Court of Appeals and Tax Court Docket No. 55212.]

PETITION FOR REVIEW

To The Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Comes Now the Petitioner on Review, Continental Trading, Inc., and hereby petitions the United States Court of Appeals for the Ninth Circuit to review the Decision filed by The Tax Court of the United States on September 4, 1957, ordering and determining that there are income tax deficiencies for the calendar years 1948, 1949 and 1950 in the respective amounts of $208,300.59, $151,559.71 and $114,468.53.

This Petition for Review is filed pursuant to the provisions of Section 7482 and Section 7483 of the Internal Revenue Code of 1954.

The Petitioner on Review, Continental Trading, Inc., is a Panamanian corporation organized in May, 1947 and maintained its principal office in Mexico City, Mexico. It filed its United States Federal income tax return for the year 1948 with the Collector of Internal Revenue for the First District of California; it filed its United States Federal income tax returns for the years 1949 and 1950 with the Collector of Internal Revenue for the District of Nevada. All of the United States income tax returns above-mentioned were filed with Collectors of Internal Revenue whose offices are within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, wherein this review is sought.

Nature of the Controversy

The principal issue presented for adjudication is whether Petitioner on Review qualified as a resident foreign corporation during the years 1948, 1949 and 1950 by engaging in trade or business within the United States as defined in Section 231 (b) of the Internal Revenue Code of 1939. A subsidiary issue involves the right of Petitioner on Review to deduct certain interest, expenses and loss on sale of property which had been disallowed by the Commissioner as not connected with income from sources within the United States. This issue was not reached below, The Tax Court of the United States having held that Petitioner on Review was not engaged in a trade or business within the United States. In addition, there is a question

of whether this case should be remanded to The Tax Court of the United States for further proceedings before this Court passes upon the merits of the principal issue. Petitioner asserts that through mistake or inadvertence certain material and relevant evidence relating to petitioner's activities in the United States during the years involved was not presented to The Tax Court of the United States and that Court, prior to filing this Petition for Review, refused to reopen the case and receive this additional evidence.

/s/ FREDERICK R. TANSILL,
Attorney for Petitioner on
Review.

[Endorsed]: T.C.U.S. Filed Dec. 3, 1957.

[Title of Court of Appeals and Tax Court Docket No. 55212.]

STATEMENT OF POINTS

Comes Now the petitioner on review herein and makes this concise statement of points on which he intends to rely on the review herein, to-wit:

The Tax Court of the United States erred:

1. In failing to determine that petitioner was a resident foreign corporation engaged in trade or business in the United States during the taxable years;

2. In failing to determine that the scope and continuity of all of the United States activities of

petitioner in the taxable years were sufficient in the aggregate to constitute "engaged in trade or business" within the meaning of Section 231(b) of the Internal Revenue Code of 1939;

3. In failing to allow petitioner claimed deductions for interest, expenses, and loss on the sale of property which were connected with income derived from sources within the United States;

4. By abusing its discretion in denying a motion for leave to file motion to vacate decision, reopen proceedings and take further testimony on the basis of mistake, inadvertence or newly discovered evidence;

5. By failing to follow the standards for relief from judgment provided by Rule 60(b) of the Federal Rules of Civil Procedure;

6. In failing to relieve the petitioner of its judgment and reopen the case for the purpose of receiving further material and relevant testimony with respect to the petitioner's United States activities during the taxable years not heretofore presented to or considered by the Tax Court which, if received, reasonably could have been expected to result in a determination that petitioner was engaged in trade or business in the United States;

7. In basing its determination upon incomplete and, in part, inaccurate facts;

8. In sustaining the deficiencies as determined by the Commissioner of Internal Revenue;

9. In that its Opinion and Decision are both contrary to law.

/s/ FRED R. TANSILL,
Counsel for Petitioner on Review.

Acknowledgment of Service Attached.

[Endorsed]: T.C.U.S. Filed Feb. 21, 1958.

[Title of Tax Court and Cause.]

CERTIFICATE

I, Howard P. Locke, Clerk of the Tax Court of the United States, do hereby certify that the foregoing documents, 1 to 32, inclusive, constitute and are all of the original papers on file in my office as called for by the "Designation of Contents of Record on Review", including Joint Exhibits I thru XVIII (1), (2), (3), XIX, XX (1), (2), XXI (1), (2), (3), (4), (5), (6), (7), XXII (1) (2), XXIII (1), (2), XXIV, XXV, XXVI, XXVII, XXVIII, XXIX (1), (2), (3), XXX (1), (2), (3), (4), (5) and XXXI, attached to the Stipulation of Facts, but excepting certain Exhibits separately certified, in the case before the Tax Court of the United States docketed at the above number and in which the petitioner in the Tax Court has filed a petition for review as above numbered and entitled, together with a true copy of the docket entries in said Tax Court case as the same appear in the official docket book in my office.

In testimony whereof, I hereunto set my hand

and affix the seal of the Tax Court of the United States, at Washington, in the District of Columbia, this 21st day of February, 1958.

[Seal] /s/ HOWARD P. LOCKE,
Clerk, Tax Court of the United States.

The Tax Court of the United States

Docket 55212

CONTINENTAL TRADING, INC.,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

TRANSCRIPT OF PROCEEDINGS

Customs Courtroom 421, 630 Sansome Street, San Francisco, California, August 30, 1956.

(Met, pursuant to call of the calendar.)

Before: Honorable Clarence V. Opper, Judge.

Appearances: Stacey H. Dobrzensky, Esq., and Milton W. Dobrzensky, Esq., 1516 First Western Bank Bldg., Oakland, California, appearing for the Petitioner. Aaron S. Resnik, Esq., (Honorable John Potts Barnes, Chief Counsel, Bureau of Internal Revenue), appearing for the Respondent. [1]*

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Proceedings

The Court: We will have the call of the calendar.

The Clerk: Docket No. 55212, Continental Trading, Inc.

Mr. Resnik: Aaron S. Resnik for the respondent and ready for trial.

Mr. Stacey H. Dobrzensky: Stacey H. Dobrzensky and M. W. Dobrzensky and ready for trial as well, your Honor.

The Court: Marked ready.

I think that is all we have, isn't it, Mr. Clerk?

The Clerk: Yes, your Honor, except I would like to make the notation in the record that there has been filed with the Court this morning the amendment to the petition and docket No. 45932, Babetta Schmidt vs. Commissioner of Internal Revenue, and the respondent's answer to the amended petition.

That is all, your Honor.

The Court: Proceed, please.

Mr. Stacey H. Dobrzensky: If the Court please, I think the first order of business—I have in my hand an original and copy of a stipulation entered into between the parties. The original contains a series of exhibits; the copy does not. Each side has copies of the exhibits and, if I may, I would like to file those at this time.

The Court: The stipulation will be received. [3]

The Clerk: The stipulation in Docket No. 55212, Continental Trading Company vs. Commissioner is received.

Mr. Stacey H. Dobrzensky: If the Court, please, Counsel has handed me a second stipulation entitled "Supplemental Stipulation of Facts" whereby parties stipulate that the photostatic copies of the returns in question may be filed in lieu of the original, which I should like to file at this time as well.

The Court: The supplemental stipulation will be received.

Now, let's get the exhibit numbers straight. Is that the only one that has exhibits, the supplemental stipulation?

Mr. Stacey H. Dobrzensky: Each has exhibits, your Honor. The main stipulation has exhibits numbered 1 through 31 attached to it and referred to and incorporated in it, and I believe that the only exhibits on the supplemental stipulation are copies of three returns for the three years.

The Court: What are they, A, B, and C?

Mr. Resnik: That is correct.

The Court: So 31 and C are the highest numbers, is that correct?

The Clerk: That is correct.

Mr. Stacey H. Dobrzensky: That would be correct.

If the Court please, your Honor will recall in the [4] discussion in chambers that one witness who has been subpoenaed by the Government will not be able to attend until Friday morning, tomorrow morning, by his absence outside of the State, and in view of the fact he was served with subpoena, I would prefer that the record show there is no objection to his failure to be present this

For the calendar years 1948, 1949 and 1950, petitioner filed its income tax returns as a resident foreign corporation under Section 231(b) of the 1939 Internal Revenue Code, reporting income from sources within the United States as follows:

1948	$817,791.39
1949	645,635.10
1950	446,863.19

In these returns, petitioner took the credits and deductions which are allowed a resident foreign corporation under Section 231(b).

In his review of these tax returns, respondent made the following determination, as set forth in the 150 day letter, a copy of which is annexed to the petition on file herein: [7]

"Explanation of Adjustments.

"(a) and (b). Your returns were filed on the basis that you were a foreign corporation but engaged in trade or business in the United States during the years 1948, 1949 and 1950; and the tax liabilities shown on your returns were computed under the provisions of sections 13 and 14, Internal Revenue Code. On the basis of information submitted and after consideration of the contentions raised in the protest filed by you, it is held that you are a foreign corporation not engaged in trade or business within the United States and subject to income tax liability determined under the provisions of section 231, Internal Revenue Code.

"In accordance with section 231 there are ex-

cluded from your taxable income the miscellaneous gains derived from sales of property in 1949 and 1950 as reported on your returns. In accordance with section 232 there are disallowed all deductions for interest, expenses and loss on sale of property for years 1948, 1949 and 1950 as claimed on your returns on the ground that such deductions were not connected with income derived from sources within the United States."

The principal question with which we are concerned [8] is whether, during the three years in question, petitioner was engaged in trade or business within the United States, and thus was taxable as a resident foreign corporation, under Section 231(b).

Most of the facts in this case are stipulated and the stipulated facts themselves show that during these three years, petitioner was substantially and continuously engaged in trade or business within the United States and that the disallowed deductions were connected with income derived from sources within the U. S.

Petitioner established a legal domicile in the United States and qualified as a resident foreign corporation in the State of Nevada on March 13, 1948, where it maintained its principal office in the United States under the control of its resident agent in that state, during 1948, 1949 and 1950.

It also maintained a business office in Oakland, California under the direction of its president, who was not a stockholder in petitioner, but who was a citizen and resident of the United States.

It kept a record in the office of its business transactions within the United States. The president was assisted by petitioner's vice president, who was also a citizen of the United States, a resident of Oakland, California and not a shareholder of petitioner.

Petitioner's many and substantial business transactions in the United States in the years in question were [9] neither sham nor unreal, but all were actual and factual, as the evidence will show.

During all of the period here involved, petitioner carried on extensive negotiations with persons from or representing foreign countries in its effort to promote and exploit petitioner's business program for the establishment and financing of recombined milk and dairy products plants in Asia, Europe, South America and elsewhere. Petitioner was actively engaged in its efforts to establish and finance recombined milk and dairy products plants in order to carry out a world-wide nutrition program that would not only enhance petitioner's financial interest, but would also be a great help to strengthen the hands of the free world in the battle against communism by feeding large masses of hungry people in other lands—people whose hunger and hopelessness made them readily susceptible to the spread of communism.

Petitioner also desired, by the establishment of these milk plants, to reduce and possibly eliminate the growing surplus of dairy products which had been accumulating in the United States.

The number, continuity and substantiality of the

petitioner's business transactions in the United States during 1948, 1949 and 1950 (in addition to those relating to its efforts to establish and finance milk plants in foreign lands, just enumerated) are set forth in the stipulation and cannot [10] be questioned:

It negotiated and made four bank loans, three in San Francisco and one in New York, which totalled $6,550,000.00 in principal amount;

These loans were secured by pledges of 55,000 shares of Servel, Inc. stock and from 278,700 to 350,000 shares of Electrolux Corporation stock;

Petitioner paid loan interest in 1948, 1949 and 1950 in the approximate sum of $175,000.00;

All of said loans were paid;

Petitioner made three loans from an individual totaling $250,000.00, and repaid these loans and the interest thereon;

The list of 176 bank checks which petitioner drew against its account with First National Bank of Nevada at Reno, Nevada, from March 18, 1948 to December 30, 1950, which list is attached to the stipulation, totalled $2,209,036.52 and the items for which the checks were drawn show the nature of petitioner's business and the continuity of its operations;

The list of 16 bank checks which petitioner drew against its account with Bank of America N.T. & S.A. at San Francisco from May 22, 1948 to September 15, 1950, which list is attached to the stipulation, totalled $1,925,806.55; [11]

Petitioner collected through its Reno, Nevada

office dividends on shares which it owned in United States corporations, totaling $1,867,385.00;

Petitioner bought a carload of anhydrous milk fat for $46,212.75 and resold it at a loss when the market price of fat dropped;

Petitioner purchased 90 carloads of tin cans from Western Can Co. for $177,980.36 and sold same to International Dairy Supply Company and others at a profit for a total sum of $183,984.74.

Petitioner sold 55,000 shares of Servel, Inc. stock in five transactions, for a total price of $538,081.98.

All of these commercial transactions actually occurred. They were neither sham nor unreal.

In evaluating these activities of petitioner to determine whether they constituted its engaging in trade or business within the United States, the rule, well established in the Tax Court, the Circuit Courts and the Supreme Court is that respondent cannot take one by one, each activity carried on by petitioner in the United States and argue that each activity is not in and of itself the transaction of business, but the composite picture of these activities must be viewed as an integrated whole and a determination made accordingly.

Although respondent has never denied that these many and substantial business transactions of petitioner actually [12] did occur, he has chosen to disregard them for the reason, expressed by the Internal Revenue Agent who reviewed this case before the Appellate Staff, that petitioner's admitted business transactions "were not fraught with sufficient business purpose."

In this respect, the respondent was undoubtedly motivated by the fact that when petitioner accepted the invitation extended by the congress to foreign corporations (in enacting Section 231(b) of the Internal Revenue Code), to engage in trade or business within the United States, petitioner thereby gained the tax advantage of being taxed as a resident foreign corporation.

However, respondent appears to have forgotten that this is the same position that he was unsuccessful in maintaining in the Tax Court in such cases as Tully, 1 T.C. 611, Hobby, 2 T.C. 980, and McKee, 35 B.T.A. 235, where he unsuccessfully contended that the actual transactions there involved could be disregarded because of his claim that they "had no business purpose" because the transactions "made a saving in income taxes," etc.

Notwithstanding his acquiescence in these adverse decisions and notwithstanding the similar decisions, adverse to him, the Circuit Courts and the Supreme Court, respondent is here urging again that petitioner's business transactions, for similar asserted reasons, are sham and unreal and may be disregarded by him. [13]

There can be no question with respect to the propriety of respondent carefully scrutinizing transactions where he believes that the only motive therefor is tax avoidance. But as shown in Sun Properties v. U. S., 220 Fed. 2d 171, 174, the error into which he has fallen is that he has elevated this rule of careful scrutiny into a purported rule

wholly devoid of legal support, which would change the substantive effect of the actual transactions.

This is exactly what the respondent has done in the present case, ignoring the fact that legitimate business transactions cannot be upset even if motivated by purposes of legitimate tax minimization. Tax minimization is not an interdicted purpose and the primary purpose to realize gain is a legitimate business purpose, even though it may have a collateral favorable tax effect.

The fact that petitioner herein makes statements concerning tax motives should not be taken by this Court to mean petitioner was motivated by, let alone solely by, tax motives—the facts negative any such contention.

As the Tax Court said in Hobby, 2 T.C. 980, 985: "The question is not one of purpose, but whether the transactions were in fact what they appear to be in form."

That the continuous business activity and numerous business transactions of petitioner actually and really [14] occurred, without pretense or unreality of any kind, are, unquestionably, established by the stipulation we are about to offer. The testimony that petitioner will offer will only serve to emphasize and underscore the substance underlying the form of a three year course of very real trade and business, and to dramatize the unreal, illusory character of respondent's assertion to the effect that "what is real is not real because it is not real."

The Court: Now, do I understand correctly that even though you have what purports to be

three assignments of error that there is really only one?

Mr. Stacey H. Dobrzensky: I think that it could be safely said that the principal question in this case is whether or not the petitioner was engaged in trade or business.

The Court: That is what I am getting at. Is there any other question?

Mr. Stacey H. Dobrzensky: All of these three stipulations, your Honor, are intertwined. They are basically all—stand upon the question, I should say, of whether or not the petitioner was a foreign corporation engaged in trade or business. It is a question of dividends receiving credit, and there is a question of certain deductions, all of which fall within the same sections and stand upon the same basic propositions.

The Court: That is what I am trying to find out now. [15] Assuming that you win on the doing business matter, would there be anything more to consider?

Mr. Resnik: Clearly there would be, your Honor, if by that your Honor means that a victory for the petitioner on that issue would mean no deficiency for each of the years in question.

The Court: I don't care about that. I want to know whether it is a contested deficiency.

Mr. Resnik: Yes. There may well be; they are conceding something by their assertion.

The Court: I am trying very hard to find out that now.

Mr. Stacey H. Dobrzensky: Your Honor, we are

contending that these deductions were erroneously disallowed.

The Court: For any other reason than that you were doing business in the United States. Now, those deductions would be disallowed automatically. If you weren't doing business, unless you contend that notwithstanding you weren't doing business, there is still connected with the receipt of income from sources within the United States. Now, do you make that contention?

Mr. Stacey H. Dobrzensky: Yes.

Mr. Milton W. Dobrzensky: Yes, of course.

The Court: In other words, that is a subordinate contention to your main one? [16]

Mr. Stacey H. Dobrzensky: They were connected. It was income derived from sources within the United States.

The Court: Well, income that is taxable under 231 if you were a foreign corporation not doing business here?

Mr. Stacey H. Dobrzensky: That is correct.

Mr. Milton W. Dobrzensky: Yes, I am sure it is.

Mr. Stacey H. Dobrzensky: That is our position, your Honor.

The Court: That is what I am trying to find out so that even though you lost on the main question, whether you were doing business here, you would still make a subordinate contention that you were entitled to the deductions, or some of them?

Mr. Stacey H. Dobrzensky: That is correct, your Honor.

The Court: Now, is there anything else? Is there any other besides those two?

Mr. Stacey H. Dobrzensky: I believe those are the issues.

The Court: For example, you said something about a dividend paid credit.

Mr. Resnik: Dividend received.

The Court: Dividends received credit. That would stand or fall on the doing business matter, wouldn't it?

Mr. Stacey H. Dobrzensky: That is correct, that is [17] correct.

The Court: Thank you.

Opening Statement On Behalf of the Respondent

By Mr. Resnik:

Mr. Resnik: May it please the Court, I didn't quite understand the position now taken by the petitioner with reference to the subordinate issues. In order that there be no confusion as to the position we take and as to the state of pleadings in which they now appear, I should like to say that there is one basic issue. That is whether this petitioner was engaged in trade and business during the years here in question, or during any of the years. On that basic question, of course, the Court might well find it was not engaged in business in all of the years. It might find it was engaged in business in all of the years, or it might find it was engaged in business in some of the years and not in others. That is a possibility under the case.

It would appear to me that if the respondent

were successful on that issue, then the deficiencies as asserted would have to stand.

The Court: Now, may I interrupt you. That is the position that Mr. Dobrzensky refuses to concur in.

Mr. Resnik: I realize that now for the first time.

I would say further that even if the petitioner were successful on the same issue, then a subordinate issue [18] still comes into play under Section 232 with reference to the appropriateness of the allowance of the deductions or any part thereof.

The Court: I don't want to interrupt you, but I would like to have you either now or later come back to that.

Mr. Resnik: I can take it up at this point. I think it might be in the interest of clarity.

Section 232 which deals with the question of allowance of deductions relates to the allowance of deductions with reference to resident foreign corporations, as well as non-resident foreign corporations, and by the use of those terms we mean corporations engaged in business and not engaged in business. Even if it were to be found that a corporation was a resident foreign corporation, all of the deductions claimed on its return would not of necessity have to be allowed.

The Court: Isn't that the same issue the other way around that we have already talked about? In other words, that issue would be the case both ways, as I understand it, whether the petitioner won on the main issue or whether the respondent won. Isn't that all you are saying?

Mr. Resnik: I am not certain that it would be in the case if the respondent won the main issue. I am certain that it is in the case of the petitioner.

The Court: It is in the case because the petitioner [19] says it is in the case. That doesn't mean he is making that contention.

Mr. Resnik: In so far as he is making that contention it is before the Court. In that connection I would like to point out to the Court that, notwithstanding that there is an assignment of error in the petition, that somewhat obliquely raises the point. There is not a single recitation of fact in the petition which raises the issue either way. Therefore, I would say on the basis of the pleadings as they now appear the alternative issue, irrespective of how the first issue is decided, must be decided in favor of the respondent.

The Court: Well, I am not going to go through this entire recitation of the facts in the petition, but since you heard that contention made, is there anything you want to do about it?

Mr. Milton W. Dobrzensky: There is nothing we want to do about it at this point. We were seeking to review the determination that was made, and we have in the stipulation: and with the other facts to be adduced we will produce in the record everything that bears upon us that would enable the Court to make whatever determination is to be made.

The Court: Mr. Resnik is saying in effect that since the way your petition is now drawn, the state

of the pleadings is such that you can't raise that issue.

Mr. Milton W. Dobrzensky: Under those circumstances, [20] this being our first notion of that idea, we would ask leave to amend our statement to set forth the pertinent facts.

The Court: Do you have any objection to that, Mr. Resnik?

Mr. Resnik: I don't know what they would be, but I certainly would have no objection. I think that is a matter of course, that they can amend their petition.

The Court: Can't we leave it like this, since the facts may be possibly all spelled out in the stipulation, that this would amount to notice that the petitioner will propose to amend his pleadings and form the proof as it goes in the case and simply stating it now so you will be advised he is making that contention? In other words, the assignment of error is not enough to include it, as I read it, and the only question is about the allegations of the facts.

Mr. Resnik: Yes.

The Court: And since whatever the facts that he relies on will be in the record, it seems to me the simplest thing, you having been put on notice now so that you won't be surprised, the simplest thing would be for him to move to amend the pleadings on the proof. Of course, if there is nothing in the proof then he is going to lose anyhow.

Mr. Resnik: Yes. By the same token, I would then, at this point, ask leave for the respondent to

have the opportunity to amend his pleadings to conform to proof if that [21] becomes apparent in the case.

The Court: I take it there would be no objection to that, excepting that it seems to me that you should state now and notify the petitioner if you think that is going to raise any issue that isn't in evidence from the pleadings.

Mr. Resnik: I should be happy to do that now. There is a possibility that under the first issue of "engaged in trade or business", if the respondent were successful on that issue—and we hope that he is—that under a certain state of facts small increases in deficiency might result based upon the fact as was read to your Honor. There was removed from reported income small amounts of gain from the sale of property. If that income arose not from the sale of property but from a type of activity more akin to a commission or rendition of a service, then clearly it would have been includable in income. It was reported on the income as a property transaction and was removed. The amount involved is frightfully small as compared——

The Court: What you are saying is you might move to ask for an increase in deficiency?

Mr. Resnik: Yes.

Mr. Stacey H. Dobrzensky: We understand that.

Mr. Resnik: There were so many places at which one could take issue with the well written statement by Mr. Dobrzensky that I am afraid my reply will be somewhat [22] disjointed.

I was a little amused to hear the great patriotic

appeal and the fact that this great company stemmed the rise and the swell of world communism. I think that one could better answer its patriotic duty by paying its just tax. But be that as it may, the stipulation that has been filed is a voluminous document. It contains a lot of words and a lot of exhibits. What the petitioner is attempting to do by the stipulation is to snow under those who consider it, and I think that the snow that will fall will melt rapidly because, as your Honor will see by going through the stipulation, every $18. item is glamorized with a multitude of documents.

The simple facts in the case are these: a Panamanian corporation was formed sometime in 1947 as a result of the incorporation of part of the fortune of the Swedish capitalist, Axel Wenner-Gren. Prior to the incorporation of this petitioner, Mr. Wenner-Gren, who was the holder of thousands and thousands of shares of Electrolux and Servel stock, both of which companies I believe he had some point in forming, had come into this country and had borrowed substantial sums of money from American banks to be used in enterprises elsewhere, particularly in Mexico. His attorney in fact in the negotiations of those transactions was one Grover Turnbow, who became the president of this petitioner.

Late in 1947 this petitioner qualified to do business [23] in the State of Nevada by the appointment of a resident agent whose business it is to act as resident agents for foreign corporations. The address used by this petitioner, P. O. Box

2540, Reno, Nevada, is the post office box of this resident agent's company. Not a single person connected with this tax payer was in Reno at that post office box. This corporation, the petitioner here, when it came into the country took over the loans of Mr. Axel Wenner-Gren and became the holder of the shares of stock in these American companies. Clearly as the holder of the shares of stock in the American companies which were paying handsome dividends, this tax payer would have to pay a handsome tax; so capable tax counsel at once would see that, in order to avail oneself of the dividends received credit, there has to be created an aura of business activity because the Code had been amended in 1942 to preclude a foreign corporation from qualifying merely by having an office in the country. At one time the tests were two, either doing business or having an office. After 1942, in order to close the loophole that existed prior thereto, the Congress said that the foreign corporation had to do business.

Now, what did this company do? It had the stock which was pledged for the loan, had paid interest on these loans in fabulous amount because they were fabulous loans being used to acquire the big operating utilities of Mexico. It had income from the dividends. That is all that appears on [24] these returns, and that is all that appears in the stipulation—some loans and some dividends received. Apparently realizing that that wasn't enough, since under the cases that clearly isn't enough, someone came along with the brilliant idea

that they would add a little meat to the skeleton and have this company sell cans.

Now, how was that done? Mr. Turnbow, through a company that he wholly owned, called the International Dairy Supply Company, which had its office over in Oakland and which occupied substantially all of the time for Mr. Turnbow and his staff, received a contract from the armed forces for the sale of milk in the Far East. In connection with that contract, it was necessary to have cans in which to send the ingredients to these foreign countries. Mr. Turnbow, through International Dairy Supply, contacted one of the large canning companies here in the city, San Francisco, Western Can Company, and commenced the ordering of these cans pursuant to this contract, and paid for them.

In December of 1948, for the first time, Continental Trading Company appears on the scene, and it transmits to Western Can Company an order for the precise type of cans that International Dairy Supply had previously ordered, precise to the extent that they were made to the specifications of this army contract. The price paid by Continental Trading was the same price that International Dairy Supply had paid. The [25] order emanated out of Mr. Turnbow's office. Mr. Turnbow, in turn, wrote to himself, or the International Dairy Supply, which was Mr. Turnbow, wrote an order to Continental Trading for these cans. So in 1948 we have one order of tin cans that Continental Trading ordered for the account of Inter national Dairy Supply which was shipped, as was

necessary under the contract, to some milk company outside of the State of California. For some reason that is not now discernible, International Dairy Supply consented to roughly a 5 per cent increase in price over what it could have gotten and it had gotten prior thereto.

That is the business activity of this corporation in 1948. It had one order of tin cans.

The Court: You mean the 5 per cent was the profit?

Mr. Resnik: Yes. The profit on that transaction out of the $823,000. of income, shown on the return, and the profit on that transaction was $120.64.

Now, in 1949, apparently having come upon a very clear method of embellishing the business purpose of Continental Trading in order to save what we see, deficiencies of a half million dollars, they continued the same circuitous routing of orders of tin cans, and in 1949 more orders were secured as routed, and what we find happens is this: that out of $605,000. of income reported on the return, Continental Trade made a gross profit there of about $3500. on cans. [26] Now Continental Trading carried no inventory of cans. It so states. It wasn't in the business of having inventories. It merely called over these orders. When I say it called over the orders, Mr. Turnbow's staff at International Dairy Supply called over the orders just as they had done before the Continental Trading Company appeared on the scene and just as they immediately after Continental left the scene, and as they are still doing today. So in 1950 we

find the same pattern; out of a half million dollars of income, a few thousand dollars results from this circuitous can transaction.

It is interesting to note that Continental Trading didn't have a single salaried employee in this country in 1948 or 1949, and the only one who earned any salary in 1950 was the president, Mr. Turnbow, who got a salary that is covered in the stipulation. So that the means that were gone through on these can transactions certainly should not be regarded by this Court as giving sufficiently to this corporation to permit it to defeat its just taxes.

Our position really is twofold. First, we say on the principal issue that irrespective of the characterization of the activities, we don't believe that they are of sufficient character and type to qualify this foreign corporation as a resident one.

Secondly, we say that if the Court were to regard these transactions as sufficient in number and character to [27] qualify, absent other circumstances, the circumstances relating to these transactions are such that they should not be dignified to permit this corporation to qualify as a resident corporation.

Actually, the broad issue that the Court faces is not really one of whether this corporation was or was not engaged in business. It is an issue that veers closely to the type of cases where we talk about substance versus form, or the presence of necessary business purpose. And as will be brought out here, and I am certain that Mr. Dobrzensky will agree with me at least in this respect, that he is a very capable if not an outstanding tax man.

The fees that his firm receives are all stipulated. They were fairly handsome and certainly — certainly under the state of the record as it will be presented to this Court, it must be clear that a corporation dealing in millions certainly would not have undertaken such a circuitous activity of ordering cans for any other purpose than one to defeat the just taxes that it should be paying here.

Just one point with reference to the question of deductions. In the absence of anything in the petition with reference to it, we can merely stand on the statutory notice of a full disallowance on either theory, whether the corporation is found qualified or not.

Mr. Milton W. Dobrzensky: On the contention [28] erroneously that the corporation qualified in Nevada in 1947, it was March 13, 1948.

Mr. Resnik: 1948, yes.

Mr. Stacey H. Dobrzensky: We are ready to proceed, then, your Honor, and will call as our first witness Marion O. Palmer.

If I may, before the witness steps forward, your Honor, I would like that the stipulation be offered in evidence if that wasn't accomplished by the previous filing; the stipulation of facts, the two stipulations, for that matter.

The Court: I think they were both received. Now they are not exactly evidence. They take the place of evidence, but they are in the record.

Mr. Stacey H. Dobrzensky: All right, your Honor.

Mr. Resnik: I was wondering whether at this time we should attempt to stipulate orally with

reference to the other matters or whether that should await the receipt of testimony.

Mr. Milton W. Dobrzensky: That is agreeable with us.

The Court: My suggestion would be that you do it now, and the way the testimony goes may be affected by what you have stipulated to.

Mr. Milton W. Dobrzensky: Subject to the objection [29] that the testimony offered were irrelevant and immaterial, we will stipulate that prior to the salary payments which were made to Mr. Turnbow, as stated by Counsel, no salary payments were made to any officers of petitioner—by petitioner to its officers in 1948, 1949 and 1950.

Will that cover that?

Mr. Resnik: And no salary payments were made to any persons who might be considered employees.

Mr. Milton W. Dobrzensky: In the United States.

Mr. Resnik: Yes, in the United States.

Mr. Milton W. Dobrzensky: Our position is that the question is what were transactions, and that in view of the determination made in the Hobby case that the purpose is immaterial, and that the question is: were the transactions in fact what they appeared to be in form? We would submit that inasmuch as that might relate to purpose, it would be both irrelevant and immaterial. Nevertheless, we will stipulate to the facts subject to that objection.

The Court: You don't require a ruling at this time?

Mr. Milton W. Dobrzensky: No, your Honor.

There is one exception to that just called to my attention. The resident agent fees in Nevada were paid.

Mr. Resnik: Yes, that is stipulated. The resident agent fees were paid to the resident agent in Nevada. There [30] are other facts that can be stipulated, and if the stipulation can be agreed upon we will eliminate the necessity of calling a witness, and Mr. Dobrzensky stated he would agree to that.

Perhaps I can state the facts and have Mr. Dobrzensky correct them if any correction is deemed necessary.

Mr. Stacey H. Dobrzensky: Which witness are you referring to now?

Mr. Resnik: The matters I will be covering now would have been the subject of testimony by Mr. Russell G. Smith, executive vice-president of the Bank of America.

Mr. Stacey H. Dobrzensky: I wonder if we couldn't, with respect to any testimony with respect to him, agree amongst ourselves without taking the Court's time. I don't think it would affect any testimony I would produce. It would save that much time. I am sure we can agree.

Mr. Resnik: That is exactly what I propose to do.

The Court: It would have this advantage: since you would produce this witness as part of your case, you can wait until your case to make the stipulation, I should think.

Mr. Resnik: We could. The only thing is, actu-

ally what I have to offer is nothing more than what could possibly have been added to the stipulation. Some of the documents are somewhat incomplete, but I would just as well defer that.

The Court: Thank you.

Mr. Milton W. Dobrzensky: Will you give us a copy [31] of that letter in the meantime? That is, the one from Russell Smith, so we will have one for our files.

The Court: That is all, Mr. Resnik?

Mr. Resnik: That is all at this time.

Mr. Stacey H. Dobrzensky: The petitioner will call Marian O. Palmer as the first witness.

Whereupon,

MARIAN O. PALMER

called as a witness for and on behalf of the petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand, please, and state your name and address for the record?

The Witness: My name is Marian Palmer, 126 Cornelia Avenue, Mill Valley, California.

Mr. Stacey H. Dobrzensky: We are guilty of a grievous error in spelling the lady's name in the stipulation and call it to your attention. We thought it was right. It was M-a-r-i-o-n, but it is M-a-r-i-a-n, so may that stipulation stand as corrected.

Direct Examination

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, were you employed by Mr. Grover Turnbow during the years 1948, 1949 and 1950?

(Testimony of Marian O. Palmer.)

A. Yes, I was. [32]

Q. And when were you first employed by Mr. Turnbow? A. In 1925.

Q. Are you still employed by him?

A. Yes, I am.

Q. What is the capacity in which you are employed by him?

A. I am Mr. Turnbow's secretary, person, confidential.

Q. Is that the capacity that you held during the years 1948, 1949 and 1950? A. Yes, it is.

Q. You have been that all the while, as a matter of fact? A. Yes.

Q. Was Mr. Turnbow president of Continental Trading, Inc., Miss Palmer? A. Yes.

Q. And in the years 1948, 1949 and 1950?

A. Yes.

Q. Was he the president of International Dairy Association, Inc.? A. Yes.

Q. A Panamanian corporation? A. Yes.

Q. Was he the president of International Dairy Supply Company? [33] A. Yes.

Q. That is the company, is it not, that had the Government contract for producing milk for the Far East Command? A. Yes.

Q. That is their supply company?

A. International Dairy Supply.

Q. And was he the president of International Dairy Engineering Company which came into being toward the middle of 1950; is that correct?

A. That's correct.

(Testimony of Marian O. Palmer.)

Q. Where did Mr. Turnbow maintain his offices?

A. At 1106 Broadway, Oakland, California.

Q. That is during the years 1948, 1949 and 1950? A. Yes.

Q. Where did he maintain his office as president of Continental Trading?

A. At that same address.

Q. Where did he maintain his office as president of International Dairy Supply Company during those years? A. At that same address.

Q. Did Mr. Turnbow's name, the name of Continental Trading, the name of International Dairy Supply Company, appear on the door of his offices and the building directory during those years? [34]

A. Yes.

Q. And the International Dairy Company, when it came into being, was it added? A. Yes.

Q. As Mr. Turnbow's personal secretary, Miss Palmer, do you have knowledge of all or most of his business activities? A. Yes.

Q. In fact, you have for all the years you have worked for him, is that correct? A. Yes.

Q. You have knowledge, do you, of his activities as president of Continental Trading? A. Yes.

Q. Will you describe briefly as to your knowledge of his activities during the years 1948, 1949 and '50 as president of Continental Trading? I don't mean everything he did, but indicate to us the kind of things he did.

A. He negotiated loans with various organiza-

(Testimony of Marian O. Palmer.)

tions, paid interest, issued instructions to me as to payment of interest.

Q. Did he engage in any other activity outside of the payment of loans and for the matters you have just mentioned?

Mr. Resnik: That is leading, your Honor. I think the witness has testified. In any event she gave an answer to the question. It has been asked and answered. [35]

Q. (By Mr. Stacey H. Dobrzensky): Were you present in Mr. Turnbow's office at any time during the years in question in which there were persons present with him in which there were discussions of the affairs of business of Continental Trading?

A. Yes. This International Dairy Association was established as a means of seeking to——

Mr. Resnik: The witness has answered the question, your Honor, I submit.

Mr. Stacey H. Dobrzensky: I will ask a further question, Counsel.

Q. (By Mr. Stacey H. Dobrzensky): Was there a discussion in your presence by Mr. Turnbow and any other person in those offices of the proposal to establish milk plants in various parts of the world?

Mr. Resnik: I object, your Honor. The question is leading, and if it is offered merely to establish the fact that a discussion was had, it wouldn't have any probative value, and otherwise if it is offered it would be hearsay. Mr. Turnbow would know.

The Court: It would be hearsay? How?

(Testimony of Marian O. Palmer.)

Mr. Resnik: As to us, she would merely be reporting that she overheard a conversation.

The Court: So would Mr. Turnbow.

Mr. Resnik: Mr. Turnbow was the participant in the [36] conversation.

The Court: I understand that this witness says that she was present. She heard what was said back and forth, the same as Mr. Turnbow. If you say it is hearsay, he couldn't testify any more than this witness could.

Mr. Resnik: Be that as it may, certainly this witness can't testify to it to prove the truth of the assertions themselves. The fact that conversation was had doesn't advance us in this case. They could have been talking about any number of things.

The Court: I might be mistaken, but I take it this is being offered merely as proof of the fact that the conversation took place.

Mr. Stacey H. Dobrzensky: That is correct, your Honor.

The Court: Do you want a ruling?

Mr. Resnik: I merely say—then my objection as to hearsay would not stand, but my objection to the fact it was leading still would.

The Court: I think Counsel will agree it is leading, and I am going to ask Counsel to be careful not to lead the witness any further.

Mr. Stacey H. Dobrzensky: Yes, your Honor.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, in your contacts with Mr. Turnbow, as [37]

(Testimony of Marian O. Palmer.)

his secretary, did he discuss with you and you with him the activities in which he engaged on behalf of Continental Trading, either in the giving of instructions to you or otherwise? A. Yes.

Q. What type of activities did he discuss with you, if you can recall any other than the ones you have previously indicated?

A. Continental Trading sought to establish recombining milk plants in foreign countries, what we call deficit milk areas, and for that purpose many people came to talk with Mr. Turnbow in my presence; in the presence of others, also. I remember specifically Mr. John Holroyd-Reece of London with Dr. Dorothy Franchetti of Florence, Italy, who came to endeavor to work out plans and specifications for the establishment——

Mr. Resnik: I submit, your Honor, this witness is not testifying as to conversations overheard. She is giving characterizations as to activities by this petitioner, and as secretary to Mr. Grover Turnbow she may well have overheard them, and perhaps we will have to sit by and hear that, although I think it is completely immaterial.

Mr. Stacey H. Dobrzensky: Counsel, you don't have to hear any more because Mr. Turnbow can tell you of the extensive negotiations, and that is the last of this series of [38] questions of this witness.

Q. (By Mr. Stacey H. Dobrzensky): Miss Pallem, were you instructed by Mr. Turnbow to perform any acts for Continental Trading?

(Testimony of Marian O. Palmer.)

A. Yes.

Mr. Stacey H. Dobrzensky: May I show these to the witness, your Honor?

The Court: Yes.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, I show you a group of papers, across the top "International Dairy Supply Co." and ask you if you can identify these and tell me where they came from?

A. These are purchase orders emanating from the purchasing department of International Dairy Supply Company, addressed to Continental Trading, Incorporated.

Q. And do you know whether or not these are from the files of Continental Trading or of International Dairy Supply? In fact, those are the ones received by Continental, are they not?

A. These are the ones received by Continental.

Q. Miss Palmer, these were received where and by whom?

A. Well, they were received by me in Oakland.

Q. In Oakland. That is, at the 1106 Broadway office? A. Yes.

Mr. Resnik: Can you ask her where they emanated from? [39]

Q. (By Mr. Stacey H. Dobrzensky): Can you state where these emanated from?

A. From International Dairy Supply Company, their procurement department.

Q. And in answer to Counsel's question, they

(Testimony of Marian O. Palmer.)

came from the same suite of offices, the same floor of the building?

A. From the same floor of the building, yes.

Mr. Stacey H. Dobrzensky: I would like to offer these as petitioner's next in order, your Honor, as a unit. There are 86, and they are in a bundle; we totalled them this morning.

Mr. Resnik: If your Honor please, I thought we were going to avoid the necessity of doing just this by our stipulation which contains an exemplar of this, and which contains a number. I, of course, can't object to their receipt other than on the grounds that they are accumulative of what we sought to avoid by our stipulation.

Mr. Stacey H. Dobrzensky: The purpose in offering them is that what is set forth in the transaction, the reality of these transactions is being challenged. The best evidence of that is the very document by which they occurred.

Mr. Resnik: Clearly not, your Honor. They could have had ten pieces of paper for each one of these cans. That is our point entirely. The more paper——

The Court: I thought we probably agreed that these [40] have to be received in any event, and as far as the argument of their probative value or the effect on the case, you won't gain anything by arguing now.

They will be received and marked in evidence, one exhibit.

(Testimony of Marian O. Palmer.)

The Clerk: Petitioner's Exhibit No. 32 is received in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 32.)

Q. (By Mr. Stacey H. Dobrzensky): Now, Miss Palmer, you testified that you received the orders from International Dairy Supply Company that were just received in evidence, and you stated that you had received instructions from Mr. Turnbow with respect to these orders, when they were received. What was the next thing that you did?

A. Continental Trading issued a purchase order to the corporation from whom he was making the purchase.

Mr. Resnik: If the Court please, in order to avoid making objections, I would appreciate—I think perhaps Counsel would agree if they were to instruct the witness not to deal in terms of corporate activities, but in terms of individuals who did these things, then I think that might permit us to move along more rapidly and not defeat the point [41] they are seeking to establish.

Mr. Stacey H. Dobrzensky: If the Court please, what Counsel is saying, I think, is that Miss Palmer should each time say, "I wrote the words 'Continental Trading Inc.' and then signed my name," when she means that by saying Continental did so and so, and will add to each answer, I am sure, a number of words. I don't see any validity in the objection simply because it was Continental. If he

(Testimony of Marian O. Palmer.)

wishes to establish that somebody else did it besides Continental through its agent, then it would be——

Mr. Resnik: We have stipulated here that Continental had no employees here.

Mr. Stacey H. Dobrzensky: No paid employee, Counsel.

The Court: I think Mr. Resnik is making a point that unless the statement is made as to who did it, that the witness is stating a conclusion.

Mr. Stacey H. Dobrzensky: All right, your Honor.

Mr. Resnik: That is correct, your Honor.

Q. (By Mr. Stacey H. Dobrzensky): You were saying, Miss Palmer, that Continental did something. Would you state what was done and who it was done by ?

A. I issued orders for Mr. Turnbow asked that these orders for Continental Trading on behalf of Continental be [42] prepared by myself or an assistant and mailed to the corporation from whom we were making the purchase.

Q. Now, I will show you a further series of papers bearing at the top the words, "Continental Trading Inc.," and ask you if these are the purchase orders to which you have just referred?

A. Yes, these are the purchase orders.

Q. They are, in fact, your retained copies, are they not? A. Yes.

Mr. Stacey H. Dobrzensky: I am sorry, Counsel, I thought I showed them to you as a whole.

I might state, your Honor, and I am sure Coun-

(Testimony of Marian O. Palmer.)

sel agrees, that these are all except those that appear as exemplars in the stipulation.

Q. (By Mr. Stacey H. Dobrzensky): I think you just testified, Miss Palmer, that these are the retained copies of purchase orders prepared by you on the Continental Trading form? A. Yes.

Q. And what was done with the original after it was prepared?

A. The original was mailed to the company or individual to whom it was addressed.

Q. These, I think, all are addressed to Western Can, [43] are they not?

A. Western Can Company, if that is where they are addressed to.

Mr. Stacey H. Dobrzensky: I would like to offer these, if the Court please, as petitioner's next in order. Counsel has some questions with respect to one of the documents.

Mr. Resnik: May I take the witness?

Voir Dire Examination

Q. (By Mr. Resnik): I show you, Miss Palmer, one of the documents in the bundle that Mr. Dobrzensky referred to, more particularly caption "Purchase order No. 168" and bearing the pencilled note "B-1074" to which is attached a pencilled note. Are you familiar with the pencilled note attached to it?

A. Yes. I mean, now that you show it to me I can see it.

Q. What is that pencilled note?

A. It appears to be an order from — signed by

(Testimony of Marian O. Palmer.)

one of the staff of the procurement department of——

Q. By whom is it signed?

A. ——of the supply company.

Q. By whom is it signed?

A. The name is signed Gertrude.

Q. And who is Gertrude? [44]

A. She was a clerk for the supply company.

Q. What was her last name?

A. Let's see. I believe it was——

The Court: Mr. Resnik, this is what is bound to happen when you stand close to the witness. It may be difficult, but I am going to ask you to stay at the counsel table so we can hear what the witness says.

Even the reporter didn't get the last answer.

Q. Can you answer the question over again, or do you want the question repeated?

Mr. Resnik: Will you read the question again?

(The question was read by the reporter.)

Q. (By Mr. Resnik): What was Gertrude's last name?

A. I believe it was Santos, though I can't be sure.

Q. You will note on the one order that we referred to and on some of the subsequent ones there are either pencilled or pen notations changing the amounts. Do you know in whose handwriting they appear? A. No, I don't.

Q. Did you make them?

A. No, they are not my handwriting.

Q. Do you recognize the handwriting?

(Testimony of Marian O. Palmer.)

A. No, I answered that question.

Q. Did you prepare each and every one of the documents? [45]

A. Yes. These were prepared at my instructions. I signed them.

Q. You didn't make the changes, then, from the typewritten to the pencil? A. No.

Q. Do you know the significance of those changes?

A. I presume that they must have been what was actually shipped.

Q. Do you know? A. No.

Mr. Resnik: I have no further questions.

The Court: We will take a ten minute recess.

(Short recess.)

Mr. Stacey H. Dobrzensky: I believe, your Honor, I had offered the series of 88 Continental Trading orders to Western Can, and Counsel had interrogated the witness with respect to them.

The Court: I haven't heard his position.

Mr. Resnik: I propose the objection to that receipt, first, on the grounds that it is cumulative; second, on the grounds that the proffered documents contain material not within the knowledge of this witness or any witness who has been offered. Therefore, I would think that the exhibit is subject to defect and cannot be received in evidence.

Mr. Stacey H. Dobrzensky: If the Court please, the [46] offer is on the basis that these are the documents from the file of Continental Trading as retained copies of orders sent to Western Can. The

(Testimony of Marian O. Palmer.)

witness testified to that fact, and with respect to the handwriting that the witness can identify. We are willing that they can be disregarded. The purpose of offering these is to establish——

The Court: Let me cut it short, if I may, and ask you; by that, you mean that you are offering these documents without including the notations that are made by anybody but this witness, is that correct?

Mr. Stacey H. Dobrzensky: That is correct.

Mr. Resnik: I think they would be objectionable because the notations go to the heart of the documents themselves. They change the amount.

The Court: May I see them, please?

Mr. Resnik: Yes, your Honor. In view of the fact there are a number I will put them in order. Beginning at this point you will find changes in pen and ink.

The Court: Well, there would be nothing to it, then, would there?

Mr. Resnik: If your Honor please, might I be heard for a moment on this? We worked very hard —I worked very hard trying to stipulate as to this. We have given the form of these activities in the stipulation. We don't deny that cans were ordered or the number of them. In fact, if your [47] Honor please, looking at the stipulation, there is a schedule attached.

The Court: Well now, Mr. Resnik, if you don't mind I am going to overrule your objection as far as the cumulative aspect of this. I am concerned

(Testimony of Marian O. Palmer.)

with what the state of the record is about this matter of notation.

Mr. Stacey H. Dobrzensky: As was said by a law professor, it is unfortunate each course in law school can't procede the other courses, and this might also apply to exhibits. These exhibits will establish the correlation between the changes that Counsel was inquiring about and the actual shipment of goods.

The Court: It is possible you should mark this for identification until that has been established.

Mr. Stacey H. Dobrzensky: I withdraw the offer and ask that it be marked as petitioner's next in order.

The Court: For identification?

Mr. Stacey H. Dobrzensky: For identification, yes, sir.

The Court: Will you take it, Mr. Clerk, please, and mark it for identification?

The Clerk: Petitioner's Exhibit No. 33 is marked for identification.

(The document above referred to was marked Petitioner's Exhibit No. 33 for identification.)

Direct Examination—(Resumed)

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, I show you a further series of papers totaling 93 in number, stapled in the corner.

Mr. Resnik: 92 in number.

Mr. Stacey H. Dobrzensky: I beg your pardon, 92. We took one off.

(Testimony of Marian O. Palmer.)

Q. (By Mr. Stacey H. Dobrzensky): Across the top it has "Western Can Company", and I ask if you can tell me what these documents are?

A. These are invoices from Western Can Company addressed to the Continental Trading Company. Attached are checks of Continental Trading Company in payment thereof.

Q. Are these documents in the files of Continental Trading? A. Yes.

Q. Were they received at the 1106 Broadway office? A. Yes.

Q. Received by you? A. Yes.

Q. Who prepared the checks that are attached?

A. I prepared the checks.

Mr. Stacey H. Dobrzensky: I will offer, then, the Western Can Company invoices just identified by the witness, with the checks attached totaling 92 in number, as a unit as [49] the petitioner's next in order, your Honor.

Mr. Resnik: May I take the witness briefly on the exhibits, your Honor?

The Court: Yes.

Voir Dire Examination

Q. (By Mr. Resnik): Miss Palmer, I notice on a number of the invoices received from Continental Can the initials "JW". Are those the initials of J. Wickersham? A. Yes, sir.

Q. J. Wickersham was a purchasing man of International Dairy Supply, was he not?

A. Yes.

(Testimony of Marian O. Palmer.)

Q. J. Wickersham was the man who prepared the order forms, petitioner's Exhibit No. 32 in evidence? A. Yes.

Q. Were those initials of Mr. Wickersham put on the document that is before you prior to the time that you wrote the check?

A. Well, I really couldn't say, but I presume they were. Of my own knowledge, I do not know.

Q. When the invoice came out, did it have those initials on it? A. Not necessarily so.

Q. What purpose did those initials serve? [50]

A. I don't know.

Q. Did you ask Mr. Wickersham to check out the amounts of the invoices before you wrote the check?

A. Those initials are only on a few of these.

Q. That is correct, not on all?

A. As I said, I don't know.

Q. I call your attention, Miss Palmer, to invoice No. 4209 dated April 21, 1949, and direct your attention to the printing and writing in pen appearing thereon, which says as follows: "Add 5 per cent when billing Dairy Supply. Dairy Supply bills Caldwell at cost."

Can you identify that handwriting?

A. I think the first handwriting is that of Mr. Wickersham. The second I don't think is his. It doesn't look to me like it.

Q. When you talk about the first, what does that encompass?

(Testimony of Marian O. Palmer.)

A. It says, "Add 5 per cent when billing Supply Company."

Q. And what is the second?

A. It says, "Dairy Supply bills Caldwell at cost."

Q. Was that in your handwriting?

A. No, it is not my handwriting.

Q. Isn't that also in the handwriting of Mr. Wickersham?

A. It may be. They don't look exactly alike to me.

Q. You can't identify the so-called second handwriting? [51] A. Not positively, no.

Q. Was that on that invoice when it came to you? A. I don't recall.

Q. In what amounts would you write the checks covered by those invoices?

A. In this particular case, the total amount of the invoice noted is $1,863.83. I would deduct 1 per cent and make out a check for that amount.

Q. Was that done on each invoice?

A. If it wasn't it was an error. It was supposed to have been done that way.

Q. You mean to say that every time an invoice came in you wrote a check for that particular invoice?

A. No. I think you will find that several invoices are covered by one check.

Mr. Resnik: I will have further questions with reference to the materials covered, but I will not pursue the voir dire examination. However, I will

(Testimony of Marian O. Palmer.)

interpose an objection to the receipt of the documents on the basis of the examination. The witness apparently is not familiar with all of the notations and legends appearing on the document, many of which may be significant, if they are to be received.

Mr. Stacey H. Dobrzensky: If the Court please, we are offering these, as I previously indicated, for the sole purpose of establishing the number of the transactions and the [52] occurrence of the transactions by producing the records that establish each step of each transaction. The exemplars of all these transactions are already stipulated to in the form of the transaction, the form of the document. Counsel indicated surprise at these being produced at the trial, having forgotten the conversation which we had and in which it was discussed that rather than to have put these in the stipulation, I think he suggested that either party would be free to offer any other document he might have, and we did not want to put the total mass in the stipulation; that is my recollection of it. I wish to offer these as the document—in the case of the ones in the witness' hands, the invoice from Western Can to Continental Trading and Continental Trading check in payment of it, less the 1 per cent discount, or in certain cases a single check for a series of invoices, as being exactly what they are. She has identified the documents as being from the files of the corporation and being their records of these transactions.

What I will point out in a moment, your Honor, in these two exhibits is when there are changes on

(Testimony of Marian O. Palmer.)

the Continental Trading orders to Western Can, which is marked for identification as petitioner's No. 33, the changes appearing thereon are based upon the shipment by Western Can pursuant to the order, and some smaller amount or slightly larger amount than was ordered. If the order said 6,000 units and 6,003 units [53] are shipped, then there appears a notation on the exhibit for identification, 33, of the appropriate document a change in ink. It was obviously placed upon there by someone after the invoice was received.

The Court: In other words, you can take these and check them against the documents appearing in it?

Mr. Stacey H. Dobrzensky: That is correct. In the case of one where it shows the words are added "paper wrap $10.00." and things of that sort, those facts appear in the billing that the witness has in her hand.

The Court: It is a little difficult to rule on this, Mr. Resnik, because the question I would have liked to have asked was not asked, which would be: were these invoices received in the regular course of petitioner's business. I am sure you would be on your feet in a minute because that is the issue in the case, and yet I don't see how I can rule on it.

Mr. Resnik: If your Honor please, it wasn't my purpose to keep anything out of court. What we tried to do by the stipulation——

The Court: May I interrupt you just a minute. I would like to follow up what I started to say. If

(Testimony of Marian O. Palmer.)

these documents were received admittedly by the taxpayer in the regular course of business, it wouldn't normally be necessary for the person who was identifying them to be able to account [54] for everything that was on the paper which might be prepared by a third person, as they were in this case by Western Can, and they would still be admissible as part of the records of the business. Now, our trouble here, of course, is, as I say, that maybe they weren't received in the regular course of business because maybe there wasn't any course of business. That is what you say. But I am not going to keep them out on that ground because I think that would be prejudging the whole issue in the case, so I will overrule the objection, and this exhibit will be received for what it is worth and marked in evidence.

Mr. Stacey H. Dobrzensky: On the same basis, your Honor——

The Court: Just a minute. Would you let the clerk take care of this first?

Mr. Stacey H. Dobrzensky: I am sorry.

The Clerk: Petitioner's Exhibit No. 34 is received in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 34.)

Mr. Stacey H. Dobrzensky: On the basis of the offer of this last exhibit and your Honor's ruling thereon, may I now offer petitioner's exhibit

(Testimony of Marian O. Palmer.)

marked No. 33 for identification to be received in evidence as petitioner's No. 33? [55]

The Court: The same ruling. It will be received and marked in evidence.

Mr. Stacey H. Dobrzensky: Thank you, your Honor.

The Clerk: Petitioner's Exhibit No. 33, marked for identification, is received in evidence.

(The document above referred to, previously marked for identification, was received in evidence as Petitioner's Exhibit No. 33.)

Mr. Stacey H. Dobrzensky: If the Court please, that is the last of such series.

Direct Examination—Resumed

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, I will show you a group of papers with the heading "Continental Trading Inc." printed on the top, and the word "invoice" typed above that. They total 86 by my count, and I will ask you if you will identify those documents?

A. These are invoices of Continental Trading Inc.

Q. Addressed to whom?

A. Addressed to International Dairy Supply Company, 1106 Broadway, Oakland 7, showing——

Q. Pardon me——

A. Showing to whom product was to be shipped.

Q. Are those the——

Mr. Resnik: Pardon me. I didn't get the last part. [56]

(Testimony of Marian O. Palmer.)

The Witness: To whom the produce was to be shipped.

Q. (By Mr. Stacey H. Dobrzensky): Are those the originals or are those retained copies?

A. These appear to be the originals.

Q. Were these prepared by you, Miss Palmer?

A. By me or at my instructions.

Q. Where, for example, on the top one, where it has typed "Continental Trading Inc. by M. O. Palmer," that would be—— A. My signature.

Q. Your signature? A. Yes.

Mr. Stacey H. Dobrzensky: I would like to offer this series, your Honor, of invoices from Continental Trading Inc. to International Dairy Supply Co. as the petitioner's next in order.

Mr. Resnik: May I take the witness?

Mr. Stacey H. Dobrzensky: This is for the same purpose as the previous similar exhibits. This is the last of a series.

Voir Dire Examination

Q. (By Mr. Resnik): Referring to the documents that you identified for Mr. Dobrzensky, you see on those documents again the initials JW. Are those the initials of J. Wickersham to whom we have [57] previously referred?

A. Yes, the two that you have shown me do appear to be.

Q. There are more than two in the file that contain the initials JW, are there not?

(Testimony of Marian O. Palmer.)

A. There are fewer than are without the initials.

Q. Now, directing your attention to invoice No. B-1008, dated May 4, 1949, I see the handwritten legend, "Do not bill Consolidated." Did you write that? A. No, that is not my writing.

Q. Do you know in whose handwriting it is?

A. No.

Q. Do you know what the significance of that is?

A. I do not.

Q. I show you, Miss Palmer, the first of the documents numbered B-1003, and direct your attention to the penned legend, "Bill Caldwell at cost" is that in your handwriting?

A. No, it's not.

Q. Do you know whose handwriting it is?

A. It would be difficult to identify that.

Q. Do you know what the significance of that is?

A. No.

Q. In the course of your activities as secretary for Mr. Turnbow, did you perform any services for International Dairy Supply Company? [58]

A. As his secretary, as his — in his capacity as president.

Q. In fact, he was the sole owner of International Dairy Supply, was he not? A. Yes.

Q. Were you as familiar with the activities of International Dairy Supply Company as you were with the activities of Mr. Turnbow in connection with Continental Trading?

(Testimony of Marian O. Palmer.)

Mr. Stacey H. Dobrzensky: I think, your Honor, this goes beyond the bounds of voir dire.

Mr. Resnik: I believe it does, and I withdraw the question.

Mr. Stacey H. Dobrzensky: Were you going to make an objection?

Mr. Resnik: I make the same objection to this group of documents as I made to the others.

The Court: Same ruling. It will be received and marked in evidence, one exhibit.

The Clerk: Petitioner's Exhibit No. 35 is admitted in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 35.) [59]

Direct Examination—(Resumed)

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, with respect to the invoices that you just identified, which have just been received in evidence, were they paid? That is, was a payment made by International Dairy Supply Company to Continental Trading?

Mr. Resnik: I object. All she would know at best would be whether the check had been received.

Mr. Stacey H. Dobrzensky: I withdraw the question.

Q. (By Mr. Stacey H. Dobrzensky): Were checks received from International Dairy Supply Company in the amount of the invoices that were

(Testimony of Marian O. Palmer.)

sent to them as just received in evidence and received by Continental Trading?

Mr. Resnik: I object to that, your Honor. It is quite clear the stipulation covers it, that a check was transmitted under the name of International Dairy Supply to Continental Trading in connection with each of these transactions. Each is covered in the stipulation.

Mr. Stacey H. Dobrzensky: I fail to see the objection, Counsel. You are stating the thing I am asking the witness did occur.

Mr. Resnik: Then I think it is covered by the stipulation.

The Court: If that is the fact, then it is [60] objectionable if it has already been stipulated.

Mr. Resnik: If your Honor please, I think we can make a lot of progress if we merely understand each other and the Court will understand us. There comes a point of time in cases of this kind where it is difficult in terms of language for each side to get across the point it wishes to make. Certain shorthand expressions sometimes have to be used. Now, suffice it to say that in the stipulation we have tried to cover what is the form of these transactions. There can be no dispute that there were documents of the kind that we have here now.

The Court: Just a minute. I am not sure that you need to argue this point, Mr. Resnik. I haven't heard from Mr. Dobrzensky yet as to whether he agrees that this is stipulated.

Mr. Stacey H. Dobrzensky: If the Court please,

(Testimony of Marian O. Palmer.)

the stipulation in paragraph 11 on page 16 states: "International Dairy Supply Company paid the price of each such carload pursuant to invoice."

What I would like to establish by my question is that we are talking here about transactions. Counsel says there is a mere shell and nothing else. I intended by these questions to show that a check was drawn by International Dairy Supply, was delivered to Continental, was deposited by Miss Palmer in the bank account of Continental in Reno, Nevada, [61] which to me are the intestines, the insides of the substance and reality of it. We have here obvious challenges to the reality of transactions we are satisfied did occur. Counsel stipulated they did occur, but he questions whether or not the manner in which they occurred might be such as to say they can be, must be disregarded. Therefore, by showing that these things did in fact occur in the payment that we have stipulated to, checks were transmitted by one corporation to another corporation and in turn transmitted to its resident agent or directly to the bank in Reno. Those are the things that actually happened that destroy any illusion of any mere form and no substance.

Mr. Resnik: That clearly doesn't establish that.

The Court: Wait a minute, Mr. Resnik: Perhaps it doesn't, but the petitioner wants to put it in; and, having read that, I cannot rule that it violates the stipulation because the stipulation doesn't say how payment was made.

Mr. Resnik: Well, in that event, then I think if

(Testimony of Marian O. Palmer.)

we are interested in how payment was made, then we should receive the actual facts with reference to how payments were made and not the conclusion of the witness that a check was prepared by International Dairy Supply, and so forth.

The Court: I understood Mr. Dobrzensky to say that if you wish he will produce the checks. That, however, I think will really extend the scope of the proceedings. [62]

Mr. Resnik: I am prepared to stipulate to all of these facts. I thought we had. I would be glad to do it.

The Court: It is a very simple matter. The question of the witness was a check drawn for each one of these invoices. If you were to allow the witness to answer that question, that would be the end of it, wouldn't it?

Mr. Resnik: No. What I am prepared to stipulate is that there was received in the internal transactions at 1106 Broadway in Oakland a check drawn on the bank account of International Dairy Supply made payable to Continental Trade Company in the amounts of these invoices, Exhibit No. 35.

Mr. Stacey H. Dobrzensky: I will accept that, your Honor, as being entirely satisfactory.

Mr. Resnik: I don't deny that, your Honor.

The Court: Now, just a minute. You offered to stipulate it, and Mr. Dobrzensky says he agrees, and that will take care of it; is that correct? Thank you.

(Testimony of Marian O. Palmer.)

Mr. Resnik: If I may be heard further with reference to that, in order that our position is not prejudiced, and in order that we can comply with the Court's rules and stipulate, we are not attacking the form of what was done. That was done and it is before the Court. We want the Court to have it. The question transcends that, and we don't want, by our stipulation, to have the Court conclude that we have gone beyond that. As I say, it is difficult many times in the [63] language to make our position clear, but we cannot impugn the fact that certain form was done, a certain form——

The Court: I think we understand each other. I take it you are withdrawing that last question?

Mr. Stacey H. Dobrzensky: Yes, your Honor, in favor of the stipulation.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer,——

Mr. Resnik: You don't have to ask the witness to identify them. You can tell the Court and I will object to it, and I think we covered all of that.

Mr. Stacey H. Dobrzensky: If the Court please, Counsel has indicated without identification of the witness I might state to the Court the documents I hold in my hand. There is a series, 6 bundles, each of which contains first on the heading of Bank of America, International Banking Department, the document entitled "Credit advice" bearing a date of December 14, 1949, addressed to—it says to Continental Trading Inc., 1106 Broadway, Oakland, attention Mr. Grover D. Turnbow, and these are the

(Testimony of Marian O. Palmer.)

credit advice showing they were deposited to the account of Continental in connection with sales of certain Servel stock, the sale of which and the terms of which are stipulated to.

Again, as in the previous series of documents, I wish to offer these on the same basis as I previously offered [64] the other documents. In each case they also contain a deposit slip on the First National Bank of Nevada at Reno, a duplicate deposit slip showing the deposit amount noted on the credit advice forwarded by the bank. I wish to offer this as petitioner's next in order. Counsel indicates that he has an objection to it, although he stated he need not examine the witness. I would like to ask the witness one question, however.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, these documents that I have just described, you are familiar with them, are you?

A. Yes.

Q. And they are the credit advices with the attached notification slips received at the 1106 Broadway office of Continental, is that correct?

A. That's correct.

Mr. Resnik: If your Honor please, beginning at page 10 of the stipulation the whole of the transaction is covered. Now, apparently what the petitioner is trying to do they did in part in the stipulation, and what they are trying to do here is snow us under with every little thing. As your Honor knows, if you want to pay a dollar phone bill, you can have twenty documents referring to it. What

(Testimony of Marian O. Palmer.)

we tried by the stipulation was to place in capsule form what was done. I tried, but I was overruled too frequently by the petitioner, [65] and the stipulation got out of hand. They are apparently not content and want to add to the stipulation when it, in itself, is complete.

Mr. Stacey H. Dobrzensky: If the Court please, I am sure Counsel knows we are not attempting to snow anybody. They are challenging here the reality of these transactions, and on that issue we wish to offer these documents, the facts as to what occurred are stipulated to. The stock was sold; certain prices deposited in a bank account. Now here are the underlying instruments that show the reality of that as opposed to the unreal picture that Counsel paints.

The Court: Where was that referred to?

Mr. Resnik: Page 10 of the stipulation, Roman V and subsequent.

Mr. Stacey H. Dobrzensky: I can point out that, your Honor, in Roman V there are annexed the documents that show the consummation of the sale of the 10,000 shares. The documents I am offering are the ones in the same position with respect to the sales referred to in the next paragraph, being Roman VI.

Mr. Resnik: The obvious effect of all that has gone on and what is sought to be done here now is to duplicate the stipulation and apparently create the impression that twice as much was done than was in fact done.

(Testimony of Marian O. Palmer.)

The Court: I suppose you would have been willing to [66] stipulate at one time, wouldn't you, that a sentence to a similar effect could have been added to each of the subdivisions of Roman VI similar to what now appears in Roman V?

Mr. Resnik: Yes. We have no objection to that, your Honor. As I say, it was unnecessary then, and I believe that is wholly unnecessary now.

The Court: It perhaps is, from your standpoint. The petitioner wants to get it in again, since I can't say it contradicts the stipulation any more than this one sentence contradicted the stipulation in V, I will overrule the objection and the exhibit will be received and marked in evidence, one exhibit.

Mr. Stacey H. Dobrzensky: Yes, your Honor. They are stapled, so they may be so treated.

The Clerk: Petitioner's Exhibit No. 36 is admitted in evidence.

(The document above referred to was received in evidence and marked Petitioner's Exhibit No. 36.)

Mr. Stacey H. Dobrzensky: I have just one additional question. I had my eye on the clock. Then I will be through with this witness.

Q. (By Mr. Stacey H. Dobrzensky): Miss Palmer, you have previously testified with respect to certain records, specifically the exhibits just received in evidence, and that series just received of purchase [67] orders, invoices, checks, and that series. In addition to those, what records were maintained by you at the Continental Trading office at

(Testimony of Marian O. Palmer.)

1106 Broadway, or elsewhere, where you may have maintained them?

A. We had the bank statements, check books, and copies of statements to Continental Trading, to the head office.

Q. When you say the head office, you are referring to the office mentioned in the stipulation; that is, at Mexico City? A. That's right.

Mr. Stacey H. Dobrzensky: That is all the questions we have of this witness, your Honor.

The Court: You will have some cross examination?

Mr. Resnik: Yes, your Honor.

The Court: You won't object if we recess now?

Mr. Resnik: No, not at all.

The Court: We will take a recess until 2:00 o'clock.

(Whereupon, at 12:05 p.m., a recess was taken until 2:00 p.m. of the same day.) [68]

After Recess, 2:15 p.m.

The Court: Now we are ready to proceed.

The Clerk: We will proceed with Docket No. 55212.

Mr. Stacey H. Dobrzensky: At the time of the noon recess I had concluded the direct examination of Marian Palmer, and I imagine you wish to proceed with the cross examination.

Mr. Resnik: Yes. Perhaps before we begin the examination of the witness, in order to expedite the

hearing of the case, I will ask Mr. Dobrzensky if he will stipulate with me a fact which I thought was in the stipulation but apparently is inadvertently omitted, that Mr. Grover Turnbow, whom we have here referred to and who is referred to in the stipulation, was a stockholder of International Dairy Association.

Mr. Stacey H. Dobrzensky: The stipulation, I think, shows he was a 10 per cent stockholder. We added the paragraph toward the end of our discussion. If it isn't there, we can certainly stipulate to it—on page 4, paragraph 11.

Mr. Resnik: Yes, thank you. I see it now.

MARIAN O. PALMER

resumed her testimony as follows:

Cross Examination

Q. (By Mr. Resnik): Miss Palmer, you testified under direct examination that you and Mr. Turnbow, as well as others, of course, [69] occupied office space at 1106 Broadway in Oakland during the years 1948, 1949 and 1950, is that correct?

A. Yes, that's correct.

Q. When did you and Mr. Turnbow move into that office? A. In 1947.

Q. Can you give us a more precise time?

A. It was toward the latter part of May, 1947.

Q. At that time, whose names appeared on the entry to the office?

A. Of course, Mr. Turnbow's, International Dairy Association. At that time I think that was all.

(Testimony of Marian O. Palmer.)

Q. International Dairy Supply Company's name did not appear at that time?

A. Not at that time.

Q. What space—where did you occupy space before that, before moving to 1106?

A. At 1404 Franklin Street, Oakland.

Q. Was that an office? A. Yes.

Q. An office building? A. Yes.

Q. Whose office was that?

A. Mr. Turnbow's office.

Q. What business was he in at that time?

A. He had personal operations of one sort and another. [70]

Q. What names appeared on the door, if any?

A. G. D. Turnbow.

Q. Now then, in 1947, when you commenced occupying the space at 1106 Broadway, that was the sole office space that Mr. Turnbow occupied in this area? A. Yes.

Q. Sole office space he occupied in California?

A. Yes, I believe so.

Q. It was the only office he had? A. Yes.

Q. When was the name International Dairy Supply Company added to the door?

A. I don't recall exactly. I believe it would have been soon after the formation of the corporation.

Q. Do you know who executed the lease for the office space at 1106 Broadway?

A. International Dairy Association.

Q. Who paid the rent?

(Testimony of Marian O. Palmer.)

A. International Dairy Association.

Q. 1106 Broadway, is that an office building in the City of Oakland?

A. Yes, it is the Key System Building.

Q. And you occupied an office on one of the floors? A. We occupied the one floor.

Q. You occupied one floor? [71] A. Yes.

Q. What floor was that?

A. The second floor.

Q. Do you mind speaking up a little bit? I have difficulty hearing you sometimes.

Now, I believe you testified that there came a time when the name Continental Trading Company or Continental Trading Inc., something to that effect, was added to the door? A. Yes.

Q. What was added? What name was added?

A. The corporation's name.

Q. Will you tell us specifically what was printed on the door? A. Continental Trading, Inc.

Q. Not Continental Trading Company?

A. No.

Q. When was that added?

A. Shortly after the formation of the corporation, in 1948.

Q. When was this corporation formed?

A. In 1948.

Q. It is stipulated the corporation was formed in 1947. A. Continental Trading?

Q. Yes.

Mr. Stacey H. Dobrzensky: That is correct, Counsel. [72]

(Testimony of Marian O. Palmer.)

Q. (By Mr. Resnik): Are you familiar with the circumstances whereby the name was added to the door?

A. I ordered it put on the door.

Q. Who ordered you to put it on the door?

A. Mr. Turnbow.

Q. Were you present at a—was there any meeting between Mr. Turnbow and Mr. Dobrzensky, Sr. whereby Mr. Dobrzensky advised Mr. Turnbow to add the name to the door?

A. Yes. Mr. Dobrzensky added—suggested that it be added to the door.

Q. Can you describe for us briefly the nature of the office space that was occupied on the second floor of the Key System Building?

A. I am afraid I don't recall the exact square footage. It seems to me it was in the neighborhood of between six and 7,000 square feet.

Q. Was it divided into offices or one large room?

A. It was divided into offices. In fact, it was divided by a hallway, a corridor of the building that separated it into two sections, the office space, each of those was then divided into offices.

Q. Now, from whom did you receive your salary as secretary for Mr. Turnbow? [73]

A. From Mr. Turnbow.

Q. You received his personal check?

A. Yes.

Q. Was that during 1948? A. Yes.

Q. During 1949? A. Yes.

Q. During 1950? A. Yes.

(Testimony of Marian O. Palmer.)

Q. Were you on the payroll of International Dairy Supply Company? A. Yes.

Q. So you received a check also from them?

A. In 1950, yes.

Q. To International Dairy Supply Company in 1950 but not prior thereto?

A. I don't believe it was prior.

Q. What about from International Dairy Association? Were you on their payroll? A. No.

Q. Were you familiar with the operations of International Dairy Supply Company?

A. Yes.

Q. Were you familiar with the fact that in 1948 they received a contract from the armed forces to supply recombined [74] milk to the Far East?

A. Yes.

Q. Were you familiar with the fact that International Dairy Supply Company ordered cans in connection with that contract from Western Can Company? A. No.

Q. Where did International Dairy Supply Company get its cans, if you know?

A. I don't know. I was not in the procurement department.

Q. What department were you in?

A. Mr. Turnbow's personal office.

Q. It has been stipulated that in 1948, during part of 1948, International Dairy Supply Company ordered cans necessary to carry out this army contract directly from Western Can Company and paid for them.

(Testimony of Marian O. Palmer.)

Mr. Stacey H. Dobrzensky: Counsel, I think in fairness to the witness you should use the language of the stipulation as to the orders because there was a limited number of them specified in the stipulation.

Mr. Resnik: If the witness knows she will tell us. If she doesn't know, she will say so.

Mr. Stacey H. Dobrzensky: Counsel, is it your purpose to contradict the stipulation?

Mr. Resnik: My purpose is to test the credibility [75] of this witness.

Mr. Stacey H. Dobrzensky: After the witness told you she doesn't know, you are going to further test her knowledge?

Mr. Resnik: I am testing her knowledge on other subjects. This is a preliminary matter.

Q. (By Mr. Resnik): It has been stipulated that International Dairy Supply Company ordered cans from Western Can Company, which cans were necessary in the fulfillment of the army contract during 1948, the same or more specifically referred to in the stipulation and Exhibit 23. I show you part of Exhibit 23——

Mr. Stacey H. Dobrzensky: Would you give—is there a sub-number there, Counsel, please?

Mr. Resnik: 2 is the sub-number.

Q. (By Mr. Resnik): Now, am I correct that you testified that you were not familiar with the fact that such orders were placed by International Dairy Supply Company?

(Testimony of Marian O. Palmer.)

A. I testified that I did not know when this started.

Q. But you do know that International Dairy Supply Company needed cans in connection with its army contract? A. Yes, sir.

Q. And you also know that International Dairy Supply ordered such cans from Western Can Company and paid for them?

A. I see this order now that you have shown to me, yes. [76]

Q. By virtue of looking at that order, your recollection is refreshed? A. Yes.

Q. Those are orders prepared by James Wickersham? A. Yes.

Q. James Wickersham, you testified, did you not, was in the purchasing department of International Dairy Supply Company?

A. That's right.

Q. He was on the payroll of International Dairy Supply Company? A. Yes.

Q. He was not on the payroll of Continental Trading? A. No.

Q. Now, also in connection with that same exhibit, you find that some of the orders were prepared by a D. P. Denning. Do you know Mr. Denning?

Mr. Stacey H. Dobrzensky: I am familiar with the name. It is S. L. Denning. The handwriting is hard to read.

Q. (By Mr. Resnik): Are you familiar with him? A. Yes.

(Testimony of Marian O. Palmer.)

Q. Who is he?

A. He preceded Mr. Wickersham in procurement.

Q. He also continued on when Mr. Wickersham came as an [77] employee of one of the companies, did he not? A. Yes.

Q. In what position did he continue?

A. I don't think I recall exactly.

Q. But he did some work for International Dairy Supply after Mr. Wickersham took over some of the procurement, did he not?

A. Yes. He went out to the Far East to administer some of the details regarding the engineering problems.

Q. On whose payroll was he?

A. International Dairy Supply Company.

Q. Now, are you familiar with the fact of how the can transactions from Western Can Company were handled after 1950?

A. I—no, I can't say that I do.

Q. Did you do anything with reference to the procurement of cans after 1950?

A. The dates would have to be verified.

Q. During what period of time did you do anything with reference to the procurement of cans?

A. During——

Q. By any of these companies?

A. 1948, 1949 and 1950.

Q. What about 1951?

A. I had nothing to do with procurement of cans in '51, to the best of my recollection. [78]

(Testimony of Marian O. Palmer.)

Q. Well now, did you start, then, working on the procurement of cans as soon as such cans became necessary under the army contract of International Dairy Supply Company?

Mr. Stacey H. Dobrzensky: That draws a lot of conclusions she would not be able to answer.

Mr. Resnik: She testified they started working on the cans in 1948. I want to find out when in 1948.

Mr. Stacey H. Dobrzensky: I agree you can ask, but you asked a lot of other things as to necessity and the like. I don't think that is a proper question.

The Court: Do you want to have the question read?

Mr. Resnik: Yes.

(The question was read by the reporter.)

Mr. Resnik: I am asking her for a point of time.

The Court: But I think Mr. Dobrzensky's point is that she has first to decide in her own mind when it became necessary.

Mr. Resnik: I will rephrase the question.

Q. (By Mr. Resnik): When in 1948 did you first undertake some activity with reference to the procurement of the cans? A. Late in 1948.

Q. How late in 1948? A. The last month.

Q. In December of 1948? [79]

A. I believe that's right.

Q. What did you do in December of 1948 with reference to these cans?

A. We issued orders upon receipt of a purchase order from Supply Company to Western Can Com-

(Testimony of Marian O. Palmer.)

pany covering the purchase of cans with shipment point designated on our order.

Q. When you say "we issued an order," did you physically type up the order?

A. I either typed up myself or it was typed by my assistant on my instructions.

Q. Who was your assistant?

A. I had several. One at about that time was named Mrs. Dillon.

Q. Who were the others?

A. Another was Miss—she was an English girl, and I am sorry, the name eludes me.

Q. Did you have any other but those two?

A. No.

Q. On whose payroll were they?

A. I believe Mrs. Dillon was International Dairy Supply Company's payroll.

Q. What about the English girl?

A. I believe she was on International Dairy Supply's payroll, but I would not be sure.

Q. Did Mrs.—— [80]

A. May I correct myself? Mrs. Dillon was on the Association payroll, and the English girl, I can't recall.

Q. Now did they also type up the purchase orders that came in on the letterheads or billheads of International Dairy Supply Company?

A. No, they didn't.

Q. Who typed those up?

A. On Mr. Wickersham's instructions I pre-

(Testimony of Marian O. Palmer.)

sume they were typed at. I know they were typed in his department.

Q. Where was his department?

A. In another office.

Q. At 1106 Broadway? A. Yes.

Q. Where was your office?

A. At 1106 Broadway.

Q. And Mr. Turnbow was at 1106 Broadway?

A. Yes.

Q. Now, can you outline for us the mechanics that transpired in the routing of these various papers that are now in evidence as petitioner's exhibits No. 32, 33, particularly?

A. The purchase orders from International Dairy Supply Company were received by me.

Q. These are addressed to Continental Trading. You say were received by you. I would like you to go back, if you can, if there was a consistent pattern with reference to their [81] handling; I would like to know that. How did they come to you, through the mail, through messenger, did you pick them up?

A. These purchase orders are made out to Continental Trading Inc., Reno, Nevada, and were forwarded to me at 1106 Broadway, in Oakland.

Q. Now, you say forwarded to you. Did you get them in the mail? A. Yes.

Q. You mean that International Dairy Supply prepared these orders, mailed them to Reno, and then Reno mailed them back to you? A. Yes.

Q. That happened in every case? A. Yes.

(Testimony of Marian O. Palmer.)

Q. Now, did you receive any oral instructions with reference to the cans before you received any of the writings, more particularly petitioner's Exhibit 32?

A. Very likely there was some discussion. I know my orders came from Mr. Turnbow as to what I was to do when the orders were received.

Q. Prior to the receipt of the orders, petitioner's Exhibit 32, did anyone tell you that International Dairy Supply needed cans and the quantity they needed? A. Yes.

Q. Who told you that? [82]

A. The procurement department. Whether it was a clerk or Mr. Wickersham, I can't say now, of the Supply Company.

Q. Someone told you that they needed some cans, and what would you do then?

A. Find out how many they needed.

Q. And after you found out how many were needed, then what did you do?

A. Went to issue an order to Western Can Company on Continental Trading order heads.

Q. Do you know Mr. Woods at Western Can Company? A. Yes, I do.

Q. Do you know Mr. Almand of Western Can Company? A. No, I don't.

Q. Mr. Woods handled this type of can for Mr. Turnbow during 1948, 1949, 1950, did he not?

A. Yes.

Q. Did you call Mr. Woods and tell him you needed the cans?

(Testimony of Marian O. Palmer.)

A. I have often talked with Mr. Woods. I don't recall whether it was on specific order or not.

Q. Didn't first call him when you got the request for cans? A. I did not.

Q. Now, I just wanted to ask you again, Miss Palmer, whether you are certain in your own mind that each of these [83] orders from International Dairy Supply, petitioner's Exhibit No. 32, came to you by mail from Reno?

A. To the best of my recollection, yes.

Q. Are you certain they weren't handed to you?

A. No.

Q. I want to direct your attention to the second order of petitioner's Exhibit No. 32, which is order No. 480-B, and is dated April 5, 1949, and is for 6,000 5-gallon cans and bears the signature of Mr. Wickersham and is addressed to Continental Trading, Inc., Reno, Nevada, and at the same time I want to direct your attention to the third sheet, purchase order No. 103, in petitioner's Exhibit No. 33, which is on the letterhead of Continental Trading, Inc. of Panama to Western Can Company, stating that the shipping dates should be April 8 to April 11 for the same cans that were ordered under date of April 5 from International Dairy Supply with shipping between April 8 and 11.

I ask you whether by looking at these two documents you still are of the view that the International Dairy Supply orders were first mailed through Reno and then remailed back to Oakland from Reno and to you.

(Testimony of Marian O. Palmer.)

A. I am quite sure these orders came in from Reno. It may be that verbal instructions were passed at the same time that the order itself was sent to Reno.

Q. That is, when we are talking about the orders sent to [84] Reno, you are talking about petitioner's Exhibit 32? A. The Supply Company.

Q. Do you know why the orders were sent to Reno and not handed across the hall?

A. That was the corporation's address.

Q. Do you know what offices the corporation had in Reno?

A. Yes. They were in the office of the Nevada Agency & Trust Company.

Q. Were you ever in those offices?

A. No.

Q. Now then, did you prepare petitioner's Exhibit 33, the purchase orders on Continental Trading, Inc. before you received the International Dairy Supply Company order?

A. Since they bear the same date, presumably I must have, or postdated my order to agree with that of Supply Company. I must admit my recollection is faulty in that way.

Q. Are you certain you didn't, or someone in your office, telephone over to Western Can Company for these cans even before petitioner's Exhibit 33 was prepared?

A. If it was, I didn't do it.

Q. Apparently then, you were not the only one

(Testimony of Marian O. Palmer.)

concerned with the procurement of cans necessary in connection with the army contract, were you?

A. No. I issued the orders of Continental Trading [85] Company covering their purchases of cans. I had nothing to do with the other procurement for Supply Company.

Q. After you prepared these orders, petitioner's Exhibit 33, what did you do with them?

A. The Continental Trading orders, do you mean?

Q. Yes.

A. Made out to Western Can Company?

Q. Yes.

A. They were mailed to Western Can Company in San Francisco.

Q. Looking at petitioner's Exhibit No. 33, can you tell me where you got the unit price for the cans that appear on it?

A. Is there a unit price shown on the purchase order of Supply Company?

Q. I will hand you Exhibit 32 and ask you to determine that.

A. I suppose this was the price agreed upon by the officers of Continental Trading, Mr. Turnbow and Western Can Company.

Q. Do you know what that price was? You said you supposed. Do you know? A. No.

Q. Do you know where you got the figure to put down there? [86]

A. From Mr. Turnbow.

Q. You mean every time a purchase order had

(Testimony of Marian O. Palmer.)

to be prepared you had to get all the information from Mr. Turnbow?

A. No. A contract for purchase at a certain price would be entered into for a certain period of time; when that time ended, the new price or perhaps a continuation of the old one.

Q. Do you know whether there was a contract between Western Can Company and International Dairy Supply Company for these cans?

A. Would you ask the question again?

Q. Will you reread the question, please, Mr. Reporter?

(The question was read by the reporter.)

The Witness: No, I don't.

Q. (By Mr. Resnik): Do you know whether there was a contract between Western Can Company and Continental Trading for these cans?

A. No, I don't.

Q. Do the files of Continental Can Company contain such a contract?

Mr. Milton W. Dobrzensky: You mean Continental Trading, not Continental Can.

Mr. Resnik: Thank you, Continental Trading.

The Witness: I am sorry, I don't know. [87]

Q. (By Mr. Resnik): Now, Miss Palmer, after the preparation of the documents comprising Exhibit 33, the orders on the letterheads of Continental Trading, addressed to Western Can, what was the next step that you did or took?

A. I received invoices from Western Can Com-

(Testimony of Marian O. Palmer.)

pany in the mail covering the shipment, indicating when the shipment had gone forward.

Q. Pardon me?

A. In compliance with Continental Trading's order, purchase order.

Q. Then Continental Trading's purchase order must have been forwarded in some manner to Western Can? A. Yes.

Q. How was that done?

A. It was mailed to Western Can. I believe I said that earlier.

Q. And then you received at 1106 Broadway the documents comprising Exhibit 34, the Western Can Company invoices? A. Yes, sir.

Q. What then did you do?

A. I checked with the procurement department of International Dairy Supply Company to make sure that the car had actually been received or had gone forward to its destination. On being sure that it had been properly routed, it was passed to the accounting department where it was paid. [88] I instructed—either made out the check myself or instructed an assistant to make out the check. It was duly signed by those authorized to sign; mailed to Western Can Company.

Q. Now, you say you had an accounting department at 1106 Broadway?

A. I was the accounting department.

Q. You? A. For Continental Trading.

Q. Were you the accounting department for International Dairy Association? A. Yes, I was.

(Testimony of Marian O. Palmer.)

Q. You were the accounting department for International Dairy? A. No.

Q. They had their own accountant?

A. Yes.

Q. Who was he? A. George A. Jones.

Q. Did you receive any salary from International Dairy Association acting as accounting department? A. No.

Q. And, of course, you received no salary whatsoever from Continental Trade? A. Correct.

Q. Now then, we are to the point now that a check was [89] prepared and sent to Western Can Company in compliance with their invoices which comprised petitioner's Exhibit 34. What was the next step?

A. We finished with the invoicing from Western Can. Is that correct?

Q. That's right.

A. Then an invoice was made on Continental Trading letter—or heading and issued to Supply Company for covering the shipment of the cans.

Q. Those are Exhibits 35. Who prepared those?

A. I either prepared them or they were prepared on my instructions.

Q. By whom, under your instructions?

A. An assistant.

Q. One particular assistant?

A. I think I have already said there were several during the period of time. The one I mentioned by name was Mrs. Dillon.

Q. Then what did you do with the invoice, peti-

(Testimony of Marian O. Palmer.)

tioner's Exhibit 35, that was prepared on the letterhead of Continental Trading?

A. Sent it to the accounting department of International Dairy Supply Company.

Q. Did you mail it to them?

A. No, I don't believe it was mailed. I think it was [90] collected with other mail by a mail clerk and distributed in that fashion.

Q. Now, I show you petitioner's Exhibit 35 and ask you where you received the information with reference to the unit price and other data appearing thereon.

A. I believe this is the price that appears on the Supply Company purchase order.

Q. That is petitioner's Exhibit 32?

A. 375.63 per thousand.

Q. As I understand your testimony, the figures that you put on or had put on petitioner's Exhibit 35 you took from petitioner's Exhibit 32?

A. Yes. There was a formula, however; it was a 5 per cent increase in the price of Western Can billing to Continental Trading.

Q. Who told you about that?

A. Well, it was part of my records and my—filed with filed instructions.

Q. Do you have a copy of the instructions that were issued you? A. No.

Q. Were they written instructions?

A. I think they were probably in my own handwriting, for my own memorandum purposes.

Q. They no longer exist? [91]

(Testimony of Marian O. Palmer.)

A. Not to my knowledge.

Q. Was it your determination that there should be a 5 per cent increase, or was it something that was told you?

A. Something that was told me.

Q. We are now to the point, Miss Palmer, of there having been prepared the invoices, petitioner's Exhibit 35, and your handing them to someone at 1106 Broadway. Do you know what happened after that with reference to these invoices, petitioner's Exhibit 35?

A. In the sense did I do it myself? No, I don't know from personal experience.

Q. What was the next occurrence in the parade of events of which you have knowledge?

A. I received——

Q. After the execution of petitioner's Exhibit 35?

A. I can't keep these exhibit numbers straight. That was the invoice of——

Q. That was the invoice on Continental Trading letterhead. Don't hesitate to ask for these at any time.

A. After these were delivered to the accounting department of Supply Company for checking and for verification, a check was prepared by Supply Company's accounting department and given to me, or handed to someone in my department, whereupon it was stamped for deposit and mailed to Continental Trading banking account. [92]

Q. Did the checks in payment of the invoice,

(Testimony of Marian O. Palmer.)

they were handed to you and were not mailed to Reno as were the orders that we previously talked about? A. No.

Q. Then apparently upon receipt of these checks they, together with any other checks, were deposited to a bank account of Continental Trading?

A. Yes.

Q. Do you now know of the time it took for you to receive a check from International Dairy Supply Company after the preparation of petitioner's Exhibit 35?

A. Judging by the dates on this invoice that I hold in my hand, which is dated March the 31st, it is stamped paid April the 8th, 1949, by check No. 683.

Q. It was a fairly immediate transaction?

A. Yes, it was ten days.

Q. Did Continental Trading Company have a warehouse at Oakland? A. No.

Q. Did it have any stock of cans? A. No.

Q. Did it ever order cans for its own account?

A. No.

Q. Did you keep the accounting records of Continental Trading? [93] A. No.

Q. Didn't you say you were the accounting department of Continental Trading?

A. What consisted of the accounting department in California, I was it.

Q. What was that?

A. Writing checks, verifying invoices, making

(Testimony of Marian O. Palmer.)

out statements to go to Continental Trading in Mexico.

Q. What was the nature of the statements that were sent to Continental Trading in Mexico?

A. They reflected the disbursements, the check numbers to whom paid, other details of accounting, and also my deposits made to the bank account.

Q. Were you familiar with the activities of Continental Trading in Mexico? A. No.

Q. Were you familiar with any other activities of Continental Trading other than that relating to these cans under the army contract?

A. Can you be more specific than that?

Mr. Resnik: Will you read the question, please, Mr. Reporter?

(The question was read by the reporter.)

Mr. Milton W. Dobrzensky: You mean in the United States, of course, or do you? [94]

Mr. Resnik: Anywhere.

Mr. Stacey H. Dobrzensky: I will object to your question, Counsel, on the grounds it assumes a fact not in evidence, to-wit, that Continental Trading had a contract with the army. You said under the army contract.

Mr. Resnik: I am sorry. I am talking about the army contract of International Dairy Supply.

The Witness: What is the question now?

Mr. Resnik: Let me rephrase it.

Q. (By Mr. Resnik): Let me go back. Were you familiar with any of the activities of Continental Trading Company in Mexico? A. No.

(Testimony of Marian O. Palmer.)

Q. Were you familiar with the fact that Continental Trading Company was the outgrowth of the consolidation of a fortune of Mr. Axel Wenner-Gren?

Mr. Stacey H. Dobrzensky: I object to that on the grounds it is a fact clearly not in evidence, and if it were a fact, it would be irrelevant and incompetent on the issue involved here.

Mr. Resnik: These are questions—this witness has come before us as one of the people familiar with the activities of Continental Trading.

Mr. Stacey H. Dobrzensky: Your question assumes one of those activities was—— [95]

Mr. Resnik: It makes no difference. I can ask her whether she knows if Mr. Wenner-Gren took a rocket to the moon. If she doesn't know she will say so. This is cross examination.

The Court: Are you raising an objection?

Mr. Stacey H. Dobrzensky: I stated my objection originally, your Honor, on the grounds it assumed facts not at all in evidence; first, assume they were facts, they are not material to any issue here. I don't think it is proper cross examination to ask her a question if she knows things that may or may not have existed, stating as if they did.

The Court: Well now, I don't know how far you want that last statement of yours to go as being a ground of an objection, but it is not my impression this is proper cross. I mean, I think this goes beyond the scope of the direct.

Mr. Resnik: With reference to that, your Honor,

(Testimony of Marian O. Palmer.)

there are two points. First, I believe the witness came before us as one of the perhaps two witnesses who will tell us of Continental Trading.

The Court: She was asked questions dealing only with this matter of the procedure with reference to cans.

Mr. Resnik: I believe her testimony went beyond that. But be that as it may——

The Court: That was my recollection.

Mr. Resnik: It was my understanding with Mr. Dobrzensky, which I am certain he will recall, it was not [96] incorporated into the stipulation that any witness presented could be cross examined about matters in the stipulation, as though that witness were used as the vehicle to get the evidence in other ways—as your Honor sees, if we stipulate a case we are precluded from cross examination; there would never be any point in stipulating. However, we did stipulate on the basis that if we didn't all of this would have to come through witnesses, and then we would cross examine, and that was our understanding.

The Court: If you have such an understanding, Mr. Resnik, of course I am not going contrary to it.

Mr. Stacey H. Dobrzensky: I think, if the Court please, that we said that we agreed to produce Miss Palmer, to produce Mr. Turnbow, although Counsel wanted to have a subpoena issued. I don't recall an agreement that any particular witness we produced could be cross examined about any matter set forth in the stipulation, because a wit-

(Testimony of Marian O. Palmer.)

ness would not know all the things that encompass it. However, I distinctly did agree that certainly either party is free to call any witnesses. If Counsel wishes to call Miss Palmer as his witness, he can examine her as to matters that are relevant to the case. We are dealing with cross examination.

The Court: I am assuming that this is cross examination, and if it is, it just isn't so, Mr. Resnik, that you can cross examine a witness on anything in the stipulation. [97] Very frequently the matters are put in a stipulation for the purpose of doing away with the necessity of calling a witness.

Mr. Resnik: I am taken completely by surprise, and it may be a matter of misunderstanding, although I think it was not. We sought to expedite the consideration of the matter by having a comprehensive stipulation to avoid the necessity and the cumbersomeness of identification and the like. Now, I can't assume at this point that this would not have been the witness through whom any of these documents would come in. Perhaps if I wait until tomorrow morning, they will say I should have asked it of the witness here yesterday. I can only on the basis of the knowledge I have assume that I can ask this witness the question. If she has no knowledge, then I will have to await some witness who has, because undoubtedly the petitioner would have had to produce someone in court to get these documents into the court. Now, whether it is this witness or another I haven't been told, and on that basis we entered into this understand-

(Testimony of Marian O. Palmer.)

ing that we would expedite the consideration of the trial by having——

The Court: As I say, I am not going to go contrary to any understanding you have, but I want to have it perfectly clear that it doesn't follow automatically from the existence of a stipulation that you can cross examine a witness beyond the scope of the direct and, if necessary, you will have to base your stipulations on that theory by, if necessary, [98] examining the witness yourself and then insisting on putting in a stipulation what is brought out by that examination.

Mr. Resnik: Unfortunately we have proceeded to a certain point here. Henceforth, what the Court says is that we should not enter into stipulations and merely have them produce the living witnesses through whom the documents come in, so that a basis of cross examination is established.

The Court: Nothing of the kind. I say if there is anything you want to get into a stipulation that wouldn't have been produced from a witness through whom this comes in, you put it in the stipulation on your side, but that is no basis for not stipulating. I have to do the best I can. Mr. Dobrzensky, as I understand it, is saying that he would produce the witness, but if you want to ask the questions you have to make him your witness. I must say that that is my impression, that that was the statement he made when we discussed this case in chambers, that he would produce Mr. Turnbow so as not to prevent you from bringing things

(Testimony of Marian O. Palmer.)

out from a live witness, but he didn't say he was going to produce him and let you cross examine him as though he were his witness; so that the best I can do on the basis of what I understand now, and my recollection of the testimony, is to rule that it is——

Mr. Resnik: Before your Honor rules, may I be heard further? [99]

The Court: Yes.

Mr. Resnik: If you recall, there was a line of questioning put to Miss Palmer with reference to her knowledge and familiarity with the activities of Continental Trading. She answered at some length with reference to that, talking of some activities that she overheard with reference to conversations with the Baroness Franchetti, which is in the record, and with reference to the sale of milk to underprivileged people. That is in the record as part of her direct examination. That far transcends her examination with reference to petitioner's Exhibit 32.

The Court: That is correct, and I recall it now.

Mr. Resnik: With reference to that, I can test her knowledge of these activities and how far it goes.

Mr. Milton W. Dobrzensky: What Mr. Resnik and I talked about was this: according to my best recollection——

The Court: This goes to a different question.

Mr. Milton W. Dobrzensky: This goes to this question of our stipulation.

(Testimony of Marian O. Palmer.)

The Court: No, no. This goes to the question of whether this is beyond the scope of the direct.

Mr. Milton W. Dobrzensky: Very good.

The Court: And I think that is correct. I think enough was brought out in connection with other matters which I had not recalled, so that I think that is correct and I [100] will overrule the objection.

Now, will you rephrase the question? I prefer not to have the reporter go all through his notes.

Mr. Resnik: Let me have a moment—yes.

Q. (By Mr. Resnik): When did you first learn of the existence of a company known as Continental Trading, Inc.?

A. Mr. Turnbow told me of it.

Q. When?

A. It must have been—I cannot be sure. It must have been either the latter part of 1947 or the early part of 1948.

Q. What was the name of the company that he used, if you recall?

A. It was Continental Trading, Incorporated.

Q. Did you ever meet Mr. Axel Wenner-Gren?

A. Yes.

Q. Did you have any discussions with him with reference to Continental Trading? A. No.

Q. Did you know who owned the stock of Continental Trading? A. No.

Q. You didn't own any stock? A. I?

Q. Yes. [101] A. No.

Q. Nor did Mr. Turnbow? A. No.

(Testimony of Marian O. Palmer.)

Q. Do you know who the officers were of Continental Trading, Inc.?

A. Mr. Turnbow was president. I believe a Mr. Franklin A. Schultze was treasurer.

Q. Did you know any of the people who ran the company in Mexico? A. I knew Mr. Schultze.

Q. Now, you testified that you were the accounting department of Continental Trading here, did you not? A. Yes.

Q. Did you prepare the tax returns of Continental Trading which are in evidence as Exhibits A, B and C, for the years—such returns being for the years 1948, 1949 and 1950?

A. May I see them?

I did not prepare these.

Q. Do you know who prepared them?

A. Mr. Schultze, I believe. I think that is in here.

Q. Do you know apart from what is said in the return? Do you have any knowledge of your own?

A. No.

Q. You are familiar with the fact, are you not, that International Dairy Supply continued, and apparently still [102] continues, to supply milk pursuant to which armed forces contract to the Far East? A. Yes.

Q. It did so provide the milk after 1950?

A. Yes.

Q. In connection with its execution of the contract, it needed cans, did it not? A. Yes.

(Testimony of Marian O. Palmer.)

Q. Did it continue to buy those cans from Western Can?

A. It must have. I mean, it must have bought cans.

Q. What part did you play in that phase, in the acquisition of cans after 1950? A. None.

Q. Was the name of Continental Trading at any time removed from the door at 1106 Broadway? A. Yes.

Q. It is not there now? A. No.

Q. When was it removed, if you know?

A. Early in 1951, I am quite sure.

Q. Did you ever make inquiry as to what happened to the receipt of orders for cans for International Dairy Supply that you had been previously handling? A. No. [103]

Mr. Milton W. Dobrzensky: Are you referring to these or others, Mr. Resnik?

Mr. Resnik: Referring to the same type.

Mr. Milton W. Dobrzensky: You mean additional to these?

Mr. Resnik: Yes.

The Witness: No, I don't.

Q. (By Mr. Resnik): Were you ever told by Mr. Turnbow or anyone else that International Dairy Supply would not be mailing orders over to Continental Trading?

A. Continental Trading withdrew from the United States, it is my understanding. They no longer existed in the United States.

Q. And at that time, then, you no longer partici-

(Testimony of Marian O. Palmer.)

pated in the execution of documents for the acquisition of cans, is that correct?

A. That's correct.

Q. Were you in the employ of Mr. Turnbow when he was at the University of California?

A. Yes, I was.

Q. During what years did that take place?

A. 1925—1925, 1926 and 'til June the 1st of 1927.

Q. Did you ever make a trip to Mexico in connection with any of Mr. Turnbow's activities? [104]

A. No.

Q. Were any books of account of Continental Trading kept by you? A. No.

Q. Were any books of accounting of Continental Trading kept in the United States?

A. Not to my knowledge.

Q. No books were kept at the box in Reno, Nevada? A. No.

The Court: We will take a ten minute recess.

(Short recess.)

Q. (By Mr. Resnik): Miss Palmer, I show you petitioner's Exhibit No. 36. Did you receive those documents at 1106 Broadway? A. Yes.

Q. Do you know what those documents purport to be?

A. This is a credit advice from the Bank of America addressed to Continental Trading, Inc. at 1106 Broadway, attention Mr. Grover D. Turnbow.

Q. Do you know where the Bank of America got the money to credit you?

(Testimony of Marian O. Palmer.)

A. Yes. They sold some securities of the corporation.

Q. Are you familiar with how the corporation acquired those securities that were sold?

A. Yes, they bought them. [105]

Q. From whom? A. Mr. Wenner-Gren.

Q. I want to refer again to petitioner's Exhibit No. 32——

Mr. Milton W. Dobrzensky: What are those, Mr. Resnik?

Mr. Resnik: They are the International Dairy Supply export purchase orders.

Mr. Milton W. Dobrzensky: Addressed to Continental?

Mr. Resnik: Addressed to Continental Trading.

Q. (By Mr. Resnik): Are you familiar with the terms and conditions that appear on the back of those purchase orders?

A. Only in a very superficial way.

Q. Were you advised by anyone, or did you on your own knowledge, seek to comply with those conditions when International Dairy Supply was billed for the cans? A. Yes.

Q. Where in Exhibit 35, Continental Trading invoices, International Dairy Supply, do you indicate that there has been compliance with the conditions appearing on Exhibit 32?

Mr. Stacey H. Dobrzensky: Will you read the question again, please?

(The question was read by the reporter.)

Mr. Stacey H. Dobrzensky: I will object to that,

(Testimony of Marian O. Palmer.)

your Honor, on the ground I know of no rule that requires any [106] order of transmittal or invoice to state that you have complied. The fact of compliance is a matter to be determined by the recipient and to take any steps if there is any objection. The conditions that are a part of the order either are complied with or they are not. There is nothing to require an affirmative statement that they are, and the question assumes the state of the law that I think does not exist and certainly is not a matter of proper cross examination.

Mr. Resnik: May I hand to your Honor petitioner's Exhibit 32 and direct your attention particularly to condition No. 2 which specifies that the invoice shall contain the quoted language.

The Court: In any event, I don't see that the question is objectionable.

Mr. Resnik: No.

The Court: Overruled.

Mr. Resnik: Will you please read the question to the witness, Mr. Reporter?

(The question was reread by the reporter.)

The Witness: I see nothing on here to indicate that they have or have not complied.

Q. (By Mr. Resnik): Are you familiar with a company known as Lecheria Nacional S.A.?

A. Yes. [107]

Q. Was that another company in which Mr. Turnbow had an interest?

A. That was a company that he engineered a plant for in Mexico City. It was the first milk—

(Testimony of Marian O. Palmer.)

whole milk recombined plant, to my knowledge, in the world.

Q. I wish to direct your attention to petitioner's Exhibit 33, the purchase orders of Continental Trading addressed to Western Can Company, and I want to direct your attention particularly to purchase order No. 162, dated July 22, 1950.

Did you receive from International Dairy Supply a request for the cans covered by that order as you did in the others prior to Exhibit 32?

A. May I see the purchase order?

Mr. Resnik: I will withdraw the question and have no further questions of the witness at this time.

Mr. Stacey H. Dobrzensky: I have no questions to ask, your Honor.

(Witness excused.)

Mr. Stacey H. Dobrzensky: At this point, I would call a witness who is at this moment, I am sure, on an airplane, as a part of our case. Your Honor mentioned, I think, at the outset this morning whether or not some part of the Government's case could go forward. That would be in Mr. Resnik's hands, of course, but our only other witness will be Mr. Turnbow whom [108] we would start off with in the morning, so the remaining portion of the day's time is now before us, whether Counsel has anything——

The Court: Does Mr. Resnik know in general what it is you expect to bring out from Mr. Turnbow?

Mr. Resnik: No, I don't know.

Mr. Stacey H. Dobrzensky: I would say that from conversations in Mr. Resnik's office, I can recall some lengthy statements of some of the purposes of this corporation, that sort of thing—the activities, I should say, that he will recall when he hears testimony on the subject. It will not be a lengthy examination, and I don't think there is anything that will surprise him, in other words.

The Court: The only reason I ask that is because it occurred to me it might make a difference in a decision as to whether the respondent can safely go ahead with any case he may have if you could be pretty specific.

Mr. Resnik: If your Honor please, there is little I can do this afternoon in any event, whether I am familiarized with the testimony or not. What I can do, irrespective of what they might say, is ask Mr. Dobrzensky to join with me in stipulating some facts that would give background to some of the documents here which have been offered, by an executive vice-president of a bank whom we can produce if he so desires.

Mr. Stacey H. Dobrzensky: Perhaps we can do that. [109]

The Court: I was going to say maybe the best use of the time would be you gentlemen *to* back to your office at one or the other of you and try to put that in writing.

Mr. Resnik: We can state it very simply.

The Court: It would be preferable to get it in writing if you can because you know as well as I

do, Mr. Resnik, that a statement by one counsel isn't necessarily concurred in by the other, and then you have to fight back and forth to get it in order. Since there is time left, I think that would be the way you could use the time the best.

Off the record.

(Discussion off the record.)

The Court: Back on the record again. I take it that there is nothing that you think we could profitably do here now. Could you give me some idea of what your estimate of time will be for tomorrow?

Mr. Resnik: I would think, barring unforeseen circumstances, we should finish in the morning.

Mr. Stacey H. Dobrzensky: With Mr. Turnbow I have about eight questions, and they relate primarily to his activities in negotiating these various plans for the various parts of the world, and part are related to that and should take a very short time, twenty minutes or thirty minutes, at the outset, and that will be the petitioner's case.

The Court: I think that comes close enough. In [110] other words, you think that with that and your cross examination and possibly even any redirect that we should be through by 12:30 or so?

Mr. Resnik: I think so.

Mr. Stacey H. Dobrzensky: I would think so.

The Court: Thank you.

We will take a recess until tomorrow morning at 10:00 o'clock.

(Whereupon, at 3:30 p.m., a recess was taken until 10:00 a.m. of the next day.) [111]

August 31, 1956

Proceedings

The Clerk: We will proceed with Docket No. 55212, Continental Trading, Inc.

Mr. Resnik: At this time, your Honor, I would like to file a second supplemental stipulation of facts. I filed an original and one copy. There is no certificate attached.

The Court: The stipulation will be received.

Mr. Resnik: By virtue of the filing of stipulation of facts, it becomes unnecessary to call as a witness Mr. Russell G. Smith who responded to a subpoena of this Court, and I would ask he be released from his subpoena.

The Court: Is Mr. Smith here? I take it there is no objection.

Mr. Stacey H. Dobrzensky: None.

The Court: You are excused.

Mr. Milton W. Dobrzensky: Mr. Turnbow, will you take the stand, please, right up here?

Whereupon,

GROVER D. TURNBOW

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand and state your name and address for the record?

The Witness: Grover D. Turnbow—T-u-r-n-b-o-w—425 Battery Street, San Francisco. [114]

Direct Examination

Q. (By Mr. Stacey H. Dobrzensky): Mr. Turn-

(Testimony of Grover D. Turnbow.)

bow, I will show you Petitioner's Exhibit No. 6, which is a promissory note that bears the typewritten name in the signature place of Continental Trading, Inc., and ask you if that is your signature that appears below? A. Yes, sir.

Mr. Resnik: Stipulated.

The Witness: It is.

Q. (By Mr. Stacey H. Dobrzensky): And with respect to the note of August the 6th, 1948, Bank of America, is that your signature? A. Yes.

Q. And with respect to a note dated September 8, 1949, I ask you if that is your signature?

A. Yes, sir.

Q. With respect to each of these notes and loans, were those negotiated by you as president of Continental Trading, Inc.? A. Yes, sir, they were.

Q. With whom did you negotiate those loans, Mr. Turnbow?

A. The three you showed me there, the Bank of America; Mr. Smith, Russell Smith, mainly.

Q. With respect to the Central Hanover loan, who negotiated that? [115]

A. I negotiated the loan with the Hanover Bank and also had the secretary of Continental Trading, Mr. Schultze, who was in New York at the time——

Mr. Resnik: If your Honor please, I will ask counsel to specify the date there. There will be some confusion because there may be more than one loan from Central Hanover Bank.

Mr. Milton W. Dobrzensky: The only one he is referring to is the one referred to in the stipula-

(Testimony of Grover D. Turnbow.)

tion, but we will give you the date of it. It is the loan referred to, Mr. Resnik, on page 13, paragraph 1, on January 3rd, 1950; petitioner borrowed from Central Hanover Bank and Trust Company of New York the principal sum of $2,000,000 evidencing the same for the note of December 30, 1949.

Mr. Resnik: Thank you.

Q. (By Mr. Stacey H. Dobrzensky): And the negotiations you referred to as taking place in New York with Central Hanover were at or about that date?

A. To the best of my knowledge, without refreshing my memory or seeing the documents.

Q. During the years 1948, 1949 and 1950 you were the president of Continental Trading at that time, were you not, during those years?

A. That's approximately so.

Q. Where did you maintain your offices during those three years? [116]

A. 1106 Broadway, Oakland, California.

Q. Did you maintain your office as president of Continental at that same location?

A. Yes, sir.

Q. During the three years of 1948, 1949 and 1950 what was the principal activity in which you engaged as president of Continental; that is, during those years?

A. Well, it was tied up with an overall program of which—of having in mind the establishment of plants in foreign countries, and Continental Trad-

(Testimony of Grover D. Turnbow.)

ing being the financial company that was to underwrite these deals—and, as I say, deals—plants in these various countries.

Q. Those were milk plants, is that correct?

A. Yes, recombined milk plants.

Q. What were some of the countries that you dealt with in those cases, if you recall?

A. Oh, Abyssinia, Peru, Venezuela, Panama, Israel, Italy—considerable time spent in Italy—Turkey, India, Philippine Islands. Many, many countries we visited and worked with.

Q. Taking, for example, Italy, that you just mentioned, would you state over what period of time negotiations took place with people from Italy, or involving a plant at Italy?

A. Length of time?

Q. By that, I mean was it part of the year 1948 or 1949?

A. It was quite a substantial length of time because the [117] matter—working out a deal with the Italian Government and our own government, because it had to be done at governmental levels in the first place to get a permit. Next the product had to be released from the United States and shipped to Italy. We had to agree to sell it. We worked with a group in Italy that had to do with the feeding of people. We were trying to get away from the give-away deal we had been doing in our country and trying to put it on a basis of making itself supporting, and we had a deal worked out with the church over there that—whereby they

(Testimony of Grover D. Turnbow.)

would take so many thousand quarts a day and would give them to needy people, and we would charge a little extra for the balance of the milk that was sold to people who could pay for it to help feed these people that were underfed. And the project was completed by—and agreed to by everyone, except one detail; and that is that we could sell our milk, but we had to take lira. That is all the Italian people had, but I had no way of getting lira back into dollars to buy more product, so the net result would have been converting all of our dollars to lira, and that's just in the last year or so. If I may mention it, President Eisenhow has been helpful in getting this thing straightened out so now that we can use—where we have the approval, and the approval isn't hard to get, but where we have the approval and complete the job on a private enterprise, which our economy is based—can now function in these foreign countries and can—and they will accept the form [118] of currency, whether it be rubles, shekels, or Hong Kong dollars or yen, whatever it happens to be, we now exchange that on a rate that the United States Government will approve of in getting back dollars to do more business and sell some of the surplus products we produced in these United States.

Q. Approximately when was it that you ran into this problem, speaking now of the Italian deal? Do you recall which year, for example?

A. I would have to refresh my memory, sir, on

(Testimony of Grover D. Turnbow.)

that. I wouldn't want to give you a statement. It was something back, '48 or '9, but I wouldn't want to be held to that.

Q. These negotiations with the people from Italy, did they take place in Italy or in the United States or where?

A. Both. I was in Italy several times. I was doing work with the United Nations. In fact I—just a group of buildings, 40 plants in Europe, for the United Nations, both behind the Iron Curtain and this side, and in my studies of that I saw this need of food and I was—I got into the United Nations because I suggested we work out a deal that let them carry their own load instead of continuing to use the taxpayers' money, and that is how part of this came along. And I visited with people in Italy many times, and I guess they made two trips to this country—two of the principals to this country.

I called upon the heads of the Catholic church; I have called upon the heads of the government, of the people, [119] and everybody was agreed, for the reason I explained to you.

Q. Now, you mentioned a considerable number of countries with whom you discussed or dealt with with respect to possibilities of establishing plants. In those cases did negotiations take place in your office in Oakland, or elsewhere?

A. Part of the time, part of the time; but some of them in Oakland, a good many of them in Oakland. As a matter of fact, I suppose in the United

(Testimony of Grover D. Turnbow.)

States most of them were in Oakland, but many times we went to these foreign countries and negotiated right on the ground.

Q. Now——

A. At their request, as a rule. Generally, you will find that some requests, a letter or some telephone—something, you will find requests for many of these places for negotiations.

Mr. Resnik: May I request that counsel ask the witness to state the period of time that we are talking about. We have covered a vast number of years.

Mr. Stacey H. Dobrzensky: I originally asked questions with respect to the years 1948, 1949 and 1950 and directed the rest of my questions to those years.

The Witness: How accurate are you on those dates? You want it on the morning of October 10, or do you want it sometime in those years? If you want those years, that covers these negotiations, if that answers your question. [120]

Q. (By Mr. Stacey H. Dobrzensky): As a matter of fact, during those three years almost all the time you were talking to someone about various one or the other of these countries and working out arrangements?

A. It is a great idea if we can get it all finished.

Q. You mentioned in respect to the Italy deal that the inconvertibility of the lira was the stumbling block. Was that true of the other countries as well?

(Testimony of Grover D. Turnbow.)

A. Yes. If you look back in our monetary system and just what happened here, you will find that money tightened up from the time we started. The matter of conversion and the stability of currencies in foreign countries was changing. Take Mexico. The peso went from, what, 2.60 when Mr. Roosevelt came in to about 11.20 or 11.80 sometimes now, and it has been fluctuating in between. Unless you can get a stable currency there is no way you can do business.

And you see—you repeat your question. I only think I partly answered it. Would you repeat your question again?

Q. Whether or not the inconvertibility that was a problem in Italy was also a problem with the other countries?

A. There has been no plan set up to convert, and Allen Sproul was the president of Federal Reserve and I knew him quite well. He assisted in trying to get the high levels to adopt a method of exchange. In fact, we prepared a plan for exchange, and you will find a little of it right in the PL—Public Law [121] 480 that was only passed a year ago. I think it moved slowly. It is like that in these things.

Q. I take it that none of these plans that you worked on during the years 1948, 1949 and 1950 materialized because of its inconvertibility?

A. That's correct. Without that you can't make it work at all.

(Testimony of Grover D. Turnbow.)

Mr. Stacey H. Dobrzensky: I have no further questions. You may cross examine.

Cross Examination

Q. (By Mr. Resnik): When did you open your first plant under this plan of recombining milk in foreign countries?

A. In reference to Continental?

Q. In reference to your activities?

A. Well, am I—I can—I don't know.

Mr. Milton W. Dobrzensky: The witness has testified, your Honor, that none of these plans that he negotiated, none of these deals came to fruition, and the question is when he opened the first plant that was never opened. That is what was puzzling the witness.

The Court: This is cross examination, Mr. Dobrzensky. If you feel your witness doesn't know the facts, that you have to testify for him, of course, I will have to take that into consideration.

Mr. Milton W. Dobrzensky: I withdraw the statement, your Honor.

The Court: Did you get an answer?

Mr. Resnik: We have no answer, your Honor.

The Witness: Will you repeat your question?

Mr. Resnik: Mr. Reporter, will you read the question?

(Question and answer read by the reporter.)

The Witness: I think that's correct, if you are asking me about Continental.

Q. (By Mr. Resnik): No, I am——

(Testimony of Grover D. Turnbow.)

A. As an individual?

Q. When you, as an individual, or through any of your corporate enterprises.

A. Oh, oh; as an individual. I operated the first plant in—let's see, November, '46, in Mexico.

Q. Was that Lecheria Nacional?

A. Lecheria Nacional, si senor.

Q. Thank you. Then did you open any in 1947?

A. I think we extended the Lecheria Nacional and another plant, Lecheria Sanataria, in Mexico. And following that, if I may add, I think we put up the Moderno Dairy. These are all that I recall during the period I had anything to do with it.

Q. Those were in Mexico? A. Si. [123]

Q. And they were your activities through your company, International Dairy Supply Company?

A. No, nothing to do with it at all. No relationship at all.

Q. Were you acting as an individual in those enterprises?

A. As a consultant. I went down there as a consultant at the request of President Aleman. He was at that time not president and expected to be, and his judgment was sound. He later ended up as president.

Q. There came a point of time when you became president of International Dairy Supply Company and its sole owner? A. That's later.

Q. When did that occur?

A. Oh, that was in—let's see. That was in July of '48, and all of the work that I did that I just

(Testimony of Grover D. Turnbow.)

mentioned here was all done prior to that, and I had no further relationship with Mexico after that.

Q. Then there was also formed and you became a stockholder in a company known as International Dairy Association? A. That's right.

Q. There was also formed a company known as International Dairy Engineering Company?

A. That came later. I operated it. I operated the engineering end of it as D.B.A., doing business as dairying engineer. There was no corporate at that time. [124]

Q. In 1948 and 1949 and part of 1950——

A. Well, that is—at that date, yes, back when I did the engineering work.

Q. Now, you stated that at present there are some plants in foreign countries other than Mexico which are recombining milk? A. Yes.

Q. When were they established?

A. When what?

Q. When were they established?

A. Well, let's see. General MacArthur asked we make the survey in 1947, I believe. I don't want to be held to the exact dates. I can get them for you exactly if you want them. About '47, and a survey was made, and I entered into an agreement. We all bid on it by negotiations, and I was awarded the contract and the government wanted me to make it a corporation.

Q. And that was——

A. That was the International Dairy Supply

(Testimony of Grover D. Turnbow.)

Company, and that was the plant that other people thought they would go in on. When it got down to the final deal there was—I went in on it.

Q. International Dairy Supply Company had the contract to supply milk to the Far East for the armed forces?

A. I had it personally, and before we finally closed it, why, they thought I should incorporate, put it into a corporation, [125] so we put it into a corporation and—I said I did it. I should have included the Bank of America.

Q. Then in connection with the fulfillment of that contract, it was necessary for you to get ingredients in this country and ship them to these foreign countries?

A. Read his question again, will you please? Or you state it over.

Q. I will be glad to.

In connection with your fulfillment; that is, International Dairy Supply's fulfillment of the contract in the Far East, it was necessary for you to obtain raw materials and other ingredients in this country and ship them overseas?

A. That's correct.

Q. And they were shipped overseas in cans?

A. That's correct. The contract called for that. The Buy American Clause required I get the products in the United States and the specifications called for cans.

Q. And those cans were ordered from Western Can Company here in San Francisco?

(Testimony of Grover D. Turnbow.)

A. Yes, that's correct.

Q. Now, then, after——

A. I didn't say Supply Company ordered from Western Can. If I got your point, you aren't asking me who bought them. You said I—you mean under my direction? That is what you mean, is it?

The Court: Let's have the question read.

(The question was read by the reporter.)

Mr. Resnik: I don't think there is any confusion in the record on the point.

The Court: There shouldn't be.

Q. (By Mr. Resnik): Now, after the erection of the plant in the Far East, I gather that no plants were erected in any other country during the years 1948, 1949 and 1950?

A. Not to my knowledge, which I had anything to do with.

Q. That is all we are asking you, matters within your own knowledge.

A. You aren't referring to the ones the United Nations built and paid for, are you?

Q. No, no.

A. I see. All right. I did design and engineer and supervise the construction, but I had nothing in it, and it is run by the people in those countries.

Q. Now, when after 1950 was a plant erected in which you or your enterprises had an interest?

A. When?

Q. Yes.

A. 1950. I will have to kind of take you over the hurdles to bring you up to date. We built five plants

(Testimony of Grover D. Turnbow.)

weeks if everything goes well, in cooperation with the United States Government and PL 480, and our own capital.

Q. When you say "our own capital" whose capital is it?

A. Foremost Dairies capital.

Q. Foremost Dairy?

A. Yes. And it's separate from Supply Company. It is called Foremost Dairies of Bangkok, Ltd. I said some local capital in Thailand. There is another in Formosa that will be opened by the first of December. That's Foremost Dairies of Taiwan. That will be opened along in the first of December, selling American dairy surplus products that taxpayers are now holding in the warehouses here, and we sell them for money, and that takes it off the taxpayers' role, and feeding people.

I have a little theory that as long as you have as many hungry people in the United States you will never have peace until you have fewer — you are going to have fewer before you have peace, and I am a bit proud of being an American, sir.

Do you want more about plants?

Q. As I gather, these are plants that are being erected in connection with the operations of Foremost Dairies?

A. That's right, that's right; and we are building one in [130] Athens, Greece that will be opened in a couple or three weeks in Athens, Greece. I think there are two in Turkey having to do with the—this isn't classified, so it is all right. United

(Testimony of Grover D. Turnbow.)

States Air Force — in fact, the one in Athens, Greece is connected with the United States Air Force. Some of the material I can't give you, but I can give you that much, I think, without divulging anything I shouldn't.

Q. Getting back to the years 1948, 1949 and 1950, when you say that some plan was devised or conceived for the erection of plants in foreign countries with various interests joining together, I gather that Continental Trading was to be a participant in that in some way?

A. Continental Trading—I have nothing to do with Continental Trading except I got these people that owned it — I sold them on an idea, at least I thought I had, to be the financial house to make it to get the money to build these—to carry the finances in to do these dairy jobs in foreign countries. They had nothing to do with the operations of milk plants, they had nothing to do, but were simply a financial house only. They had money and—some money, and I tried to make that available for the purpose of financing these various dairy companies. Nothing to do with Supply Company, but with these other operations, International Dairy Association, to be more specific.

Q. There never came any time that you had to make any [131] demand upon Continental Trading for its funds, because you never developed any plant, isn't that correct?

A. They bought—yes, I made demands on them. I asked them if they would—being president, and

(Testimony of Grover D. Turnbow.)

the free enterprise system and what seemed to be good business in getting this overall job done, I asked them to — I took it up with them, and they told me it would be all right to use them to supply cans and we bought cans. We had to buy them for other plants, if we had other plants, and I bought the cans from Continental Trading.

Q. Did Continental Trading have a warehouse of cans that you would order from?

A. No. That was handled—no, they—Continental Trading bought their cans from Western Can Company, and was handled by my secretary. She handled it. It was a simple matter. Send the order for the cans; there was only two types of cans, so there was no—simple job.

Q. It has been stipulated that International Dairy Supply in 1948 ordered cans directly from Western Can Company. Are you familiar with that? In connection with these orders in connection with the fulfillment of the Army contract?

A. I don't recall it. It could have been. I don't recall it happening because they could have been the deal hadn't been completed with Continental Trading so that they would participate as I have outlined to you. I am not saying [132] yes or no. I would have to verify that.

Q. Let me ask you this: How did International Dairy Supply get its cans after 1950?

A. After 1950 — Continental Can went out of business did it?

Q. Continental Trading?

(Testimony of Grover D. Turnbow.)

A. Trading, I meant. In 1950—I think that was the date, and 1950, and the contract — in the Far East it was a short—in fact, it reached the end of its period, its first period since it had been renewed, and they went out of business and I think Continental—I don't mean Continental; I mean Supply Company bought cans, I think, directly from Western. Now that is handled by my procurement. I can get the exact information.

Q. Did International Dairy Supply, or did you, have a contract with Continental Trading for the acquisition of cans?

A. I don't know whether it was a written contract or whether it was an oral contract, an agreement. I will have to look at it.

Q. Did you bring the records that were requested of you in response to the subpoena?

Mr. Stacey H. Dobrzensky: I think, counsel, we have the records.

Mr. Resnik: Then I would ask you to produce, if there is in existence, such a written contract between International [133] Dairy Supply Company and Continental Trading.

Mr. Milton W. Dobrzensky: There is no such contract within any of the files that were supplied to us.

The Witness: I don't know of any, I can tell you that. I told you I would have to look it up to find out.

Q. (By Mr. Resnik): Well, now, didn't there come a point of time in 1951 when you arranged

(Testimony of Grover D. Turnbow.)

some sort of a settlement with Mr. Axel Wenner-Gren and received a substantial amount of money from him?

A. '51—substantial amount of money from him. I will tell you what you can find. You can find—if I did, it is in my tax report, and you have access to it.

Q. I am asking you.

A. I got no money except what I have got——

Mr. Resnik: I will ask the Court to instruct the witness to please answer the question.

The Witness: I can't answer the question correctly, but I will get it for you, sir. It is in the tax report, and I will get the tax report.

The Court: Well, are you saying that you don't remember?

The Witness: Yes, sir; other than to say my money I got, I know it's reported in my tax report.

Q. (By Mr. Resnik): After Continental Trading Company left the country, in early 1951, didn't you have some further negotiations personally with Mr. Axel Wenner-Gren?

A. Don't think I have seen Axel since that time.

Q. Didn't you receive from him the sum in excess of $50,000 after that time?

A. After that time?

Q. After Continental Trading left the country?

A. I will get that information. I don't recall, sir. I will get the information for that, too. Unfortunately I have quite a few activities, and I can't keep all these in my mind.

(Testimony of Grover D. Turnbow.)

Q. With whom did you discuss the question of the can transactions that you said were engaged in between International Dairy Supply and Continental Trading?

A. With Axel Wenner-Gren, probably.

Q. When did that take place?

A. Prior to buying any cans.

Q. Was he in the country at that time?

A. No, I imagine he was in Mexico.

Q. Did you make a trip to Mexico?

A. I have been to Mexico a hundred times, and I can't tell you which one of those trips it happened to be on.

Q. In connection with your travels on behalf of [135] Continental Trading, were you reimbursed by that company for your travels?

A. I received the salary, and I think I got back my traveling expenses. I usually do. I intended to, if I didn't.

Q. I am not asking you to tell us. I am asking whether you know if you got paid for your travel on behalf of that company?

A. Out of pocket expenses, why, sure. That is standard procedure. I suppose I did, and I don't think he owes me any money.

Q. Can you explain to us why International Dairy Supply, after it had engaged in the operation of acquiring cans directly from Western Can Company, then sought to introduce Continental Trading into the picture?

A. Why, I thought it was a free country, pri-

(Testimony of Grover D. Turnbow.)

vate free enterprise, and I don't think there is any law that tells me to buy from you or you or you. There is nothing about that, so undoubtedly it was a good business decision, in which I probably made the decision, with their approval, to buy the cans. I am sure they would take the approval because I think they got five per cent *market*, which is a very small amount of money. We tied their money up, see.

Q. How much money of theirs did you tie up on these can transactions?

A. I don't know. What is a car of cans worth?

Q. Why don't you tell me?

A. I don't know. I can get it, though.

Q. Weren't most of those invoices for cans in the amounts of $2000 or thereabouts?

A. Have you got a copy? I can look at it and tell you.

The Court: You are showing the witness what, please?

Q. (By Mr. Resnik): I am showing the witness Petitioner's Exhibit 34.

A. Yes, this roughly—this is a regular invoice, Western Can Company.

Q. They were about $2000.

A. How much.

Q. About $2000.

A. It says $2000 here, but you say three. Where do you get three?

Q. I said two.

A. I misunderstood you. That's right.

(Testimony of Grover D. Turnbow.)

Q. And upon receipt of the invoice Continental Trading paid for it, you say?

A. I am sure they did, or Western Can would never have sold the cans.

Q. Didn't immediately thereafter International Dairy Supply send its check for payment of it?

A. I suppose they did.

Q. How much money was tied up for how long a period in [137] connection with the transactions?

A. I don't know. Get the checks and you will find out. I can't tell you how much is tied up here. Look at the bill. You got the check in your hand.

Q. Mr. Turnbow, let's assume the picture as you say it happened, that pursuant to requests from International Dairy Supply for cans Continental Trading calls Western Can Company and orders about $2000 worth of cans. Then the cans are shipped, and Western Can Company sends over an invoice for $2000 to be paid, and that is paid by a check of Continental Trading Company. Now, immediately thereafter didn't Continental Trading Company receive a check in like amount from International Dairy Supply Company and in connection therewith, I show you Petitioner's Exhibit 35.

A. So what? Nothing wrong about that.

Q. No, I am not saying anything is wrong.

A. I agree with those facts.

Q. Do you mean to tell the Court this transaction was engaged in because you wanted to tie up $2000 for a period of about three days?

(Testimony of Grover D. Turnbow.)

A. No, I didn't say that. I said——

Q. If the facts so establish, would you still maintain that this transaction was entered into because you wanted the use of Continental funds?

A. If for no other reason, sir, if for no other reason, [138] I have a right as a private citizen doing business under the free enterprise system, to buy the cans wherever I want to buy, for whatever price I want to pay. If I lose money, there is nothing wrong about it. I have done nothing any businessman hasn't done. I have got that right of decision—I better add "yet" on to that thing.

Q. Did you think it was good business to pay five per cent more for cans and also the additional costs of your secretary and other office help in connection therewith?

A. I must have or I wouldn't have done it.

Q. I am asking you; do you know?

A. I must have or I wouldn't have done it, and let me tell you probably Supply Company couldn't have bought those cans direct because Continental Can were not in business. That may have some bearing on it, but whether it was or not, there is nothing to prevent me from buying something and paying too much for it.

Q. I understand that in your own personal activities, as well as in the activities of Continental Trading Company, Mr. Dobrzensky, Sr., who is sitting at the counsel table, was your attorney and legal advisor?

(Testimony of Grover D. Turnbow.)

A. Yes, that's right. I had a right to do that, too.

Mr. Resnik: I would ask the Court to instruct the witness to answer the questions and not to engage in side remarks, and we will proceed more rapidly. There is no question [139] that he has a right to do many things, but I don't think he has the right to make those remarks in the court.

The Court: Move to strike, Mr. Resnik, if there are any answers of the witness that are not responsive.

Q. (By Mr. Resnik): Did you discuss with Mr. Dobrzensky, Sr. the question of these can purchases in 1948 and 1949?

A. I don't recall discussing it, but I discussed most everything with him of every nature I needed to discuss with my attorney.

Q. In connection with the activities seeking to establish recombined milk plants in foreign countries——

A. I am sorry, I didn't hear your statement. I just got off the plane a few hours ago, and I still got the motors roaring in my ears, and if you will speak a little louder I will appreciate it.

Q. You testified on direct examination that in 1948, commencing in 1948, I believe, thereabout, some activities were undertaken by you in connection with the possible erection of recombined milk plants in other countries. You ran into a problem of not being able to convert foreign currency into

(Testimony of Grover D. Turnbow.)

between Mr. Turnbow and [142] Mr. Wenner-Gren after 1950; secondly, the matter of his travels to Italy in connection with the opening of a recombined milk plant in that country.

Q. (By Mr. Resnik): Was the question of conversion of foreign currency present in all of the activities that were undertaken at that time with reference to all countries?

A. Not Mexico. It was not in this deal.

Q. I realize that.

A. Yes. The answer to the question is yes, except not Supply Company, because that is made with the United States Government and that is on a strictly dollar basis, and therefore there were none there, and under PL 480, now—you could have done it now.

Q. Would it have not been possible for you, through your own enterprises, to have conducted these activities?

A. I didn't have enough money. Outside of that it would have been all right.

Q. Now, you have been asked in connection with various loans that were made by Continental Trading from the Bank of America and from Central Hanover—were any sums of money from those loans used in connection with the erection of any recombined milk plant?

A. No, except there was some money sent to Mexico that they may have put into some of the Mexican plants. I could not [143] verify that.

Q. You don't know that?

(Testimony of Grover D. Turnbow.)

A. I couldn't tell you at this moment.

Q. Didn't you in 1947 act as attorney in fact for Axel Wenner-Gren in this country?

A. I think that is about the right date.

Q. Didn't you, in connection with your activities as attorney in fact, negotiate personal loans to him from the Bank of America? A. Yes.

Q. Didn't you also, in connection with your activities as attorney in fact for Wenner-Gren, negotiate personal loans to him from the Central Hanover Bank? A. Yes.

Q. And at the time that——

A. I could add that I tried to get him interested in the Far East operation, but he wasn't interested. I would liked to have had him in on this, too. Mr. A. P. Giannini came to help me out.

Q. As president of Continental Trading do you know what use was made of the funds that were borrowed from the bank?

A. Only indirectly to some extent. I know they were used by Axel. Axel wanted to use them for—and partly for this can deal.

Q. How much money did they use on the can deal? [144]

A. I don't know. Let's see, it's $2000—they told me, my secretary told me something like 90 carloads of cans. Is that about right? You have the information. I think it's about 90 carloads. You have the information.

Q. Now, Mr. Turnbow, you are a man who has been in business for a long time——

(Testimony of Grover D. Turnbow.)

A. I think they sold Servel, and I don't recall whether they sold any Electrolux. I don't think they did. I think those are the two securities that were involved, Electrolux and Servel, and they sold their Servel, but I can't recall on Electrolux. I don't think they did Electrolux.

Q. Well, now, those securities were owned by the company when you became its president, were they not?

A. Yes, sir. That is the way I recall it.

Q. Those securities were sold in order to liquidate the indebtedness that was——

A. The money borrowed prior to that, that's right.

Q. In connection with your activities as attorney in fact for Mr. Wenner-Gren, did you, on his behalf, or did he personally loan money from a company known as Teleric Incorporated?

A. Known as what?

Q. Teleric—T-e-l-e-r-i-c. [147]

A. Would you state the question again, and I will see if I can answer it.

Mr. Resnik: Will you read it?

(The question was read by the reporter.)

The Witness: I don't know the answer to that question. They were—Teleric is a corporation in which I had nothing to do with. I think, as I recall, it was in existence back prior to my many connections with this, but what was done about it, I may have sent some money to them if he told me to, but I can also find that out; my secretary would handle that.

(Testimony of Grover D. Turnbow.)

Q. (By Mr. Resnik): No need for that. During the years 1948—during the year 1948, what were your activities as an individual; what offices did you hold? A. Offices I held?

Q. Yes, in various companies.

A. I had my own personal business.

Q. That was International Dairies?

A. No, just my Grover D. Turnbow business.

Q. Oh, I see.

A. And I was president of International Dairy Supply Company during that year it was organized —in 1948 you said, didn't you?

Q. Yes.

A. And I was president of Continental Trading. I don't [148] recall any others at this moment.

Q. Did you have any office in International Dairy Association?

A. Oh, yes, that's right. International Dairy Association, which never functioned to speak of, but I was president of that, I believe.

Q. What about International Dairy Engineering Company?

A. That was just D.B.A., doing business as a private—what I said a moment ago, doing business as International Dairying Engineer. Later it was incorporated.

Q. Were there any changes in your activities in 1949, other than those we specified for 1948? You have more offices?

A. You asked me the same question for '49?

Q. Yes.

(Testimony of Grover D. Turnbow.)

A. Get your hand down. I can't hear you, see. Offices in '49—I was still president of International Dairy Supply Company. I don't recall whether Engineering was incorporated at that time or not. If it was I was the president of that; and when did Continental Trading withdraw from the United States activities? I was asked to resign, and you got that date.

Q. Yes, we have stipulated.

A. I was president up to the time they asked me—or some time a little before that, when Mr. Schultze came, I believe Mr. Schultze and Mr. Grenninger.

Q. Were you familiar with the activities of Mr. Wenner-Gren [149] when you acted as his attorney in fact?

A. As much as—to some extent. I don't think anybody is fully familiar with him being——

Q. What was the extent of your knowledge of his activities? What did you know of him?

A. What I know of him?

Q. Yes.

A. Oh, I had known Mr. Wenner-Gren since 1938 when he—when the Southern Cross picked up those 300 people in the—out from Norway, and saved them from drowning and brought them into port, if you remember that, and he was awarded a scroll of honor for having done this meritorious act, and everything he did. He came into this harbor in 1938, and that is where I first met him. I have known him for a good many years.

(Testimony of Grover D. Turnbow.)

What would you like to have me tell you about him?

Q. What were his business activities with which you were familiar during the time you were his attorney in fact?

A. This is only hearsay, but he had Electrolux business in 48 countries in the world. He has Servel in many countries. He was interested in many, many enterprises. He is one of the few billionaires in the world today.

Q. Were you familiar with any of his activities in the Republic of Mexico?

A. Oh, the milk business. I got him interested in the milk business. I wouldn't have gone forward without getting [150] him interested in it. Some of the Mexicans agreed to put in some money, but that didn't come through and he put some of his own into it; otherwise we would probably have never had a good milk supply in Mexico if it wasn't for him.

Q. Wasn't he in other ventures in Mexico himself?

A. He owned the Telefonos de Mexico, in which I had no interest.

Q. That is comparable to our American Telephone and Telegraph Company?

A. No, it is much smaller, senor, si. It is not nearly so big.

Q. Fewer telephones in Mexico?

A. It does have telephones, yes, and the Ericsson Company down there, which is owned by some

(Testimony of Grover D. Turnbow.)

Swedes—he was interested in that, too. They are all one company, I believe, and he was interested in Banco Continental, and he is interested in—he has some ranches, some farms down there. He has—he owns the Rancho Cortez, the old original rancho over near Cuernavaca, 90 acres there he rehabilitated. He owns really—he owns Paradise Island off of Nassau, and he owns half of Bermuda Island, and he has the Viking Wenner-Gren Foundation and gives Stanford a couple of $300,000 a year, and 25 other institutions he gives out of that foundation a year. In fact, that is one of the ways I got connected with him, to get some money for the University of California to do some research work. [151] That is, he came back in 1938 which brought about our acquaintance.

Q. How much money did you borrow for Mr. Wenner-Gren when you were his attorney in fact?

A. I would like to answer your question pointedly if I can, but I just can't tell you. Several million dollars.

Q. Did he indicate to you or did you know what use he planned to make and what use he did make of those funds?

A. Well, partially. I was hoping they would all be used in recombined dairy plants in foreign countries, but I have explained the reason it wasn't—I couldn't use it for that, and he used the money for some of his other enterprises, which I have little or no information about. It was his money, it wasn't mine, see.

(Testimony of Grover D. Turnbow.)

Q. How were you reimbursed or remunerated for your services as his attorney in fact?

A. Well, Continental Trading—I was paid a salary by Continental Trading. I believe it was a thousand dollars a month.

Q. You only received that salary in the year 1950?

A. I don't know if I did or not, but if I did it is reported.

Q. Didn't you receive 10,000 shares of International Dairy Association stock?

A. Yes. You want it?

Q. As remuneration? [152]

A. Yes. Do you want it? I got the paper. I did have the paper. I took it back. The company never produced anything, so it would have been good if it had amounted to anything. It is one of those things, you know.

Q. After 1950 did you receive any funds from Mr. Wenner-Gren for Continental Trading Company in connection with any of the services or expenses you incurred on its behalf?

A. I am sure I didn't.

Mr. Resnik: I have no further questions.

Mr. Stacey H. Dobrzensky: We have no further questions. With respect, your Honor, to the matters that counsel raised, information he wanted from Mr. Turnbow, I suggest if you plan to take a recess we will see if we can obtain that during that period.

The Court: If we took a very short recess there

(Testimony of Grover D. Turnbow.)

probably wouldn't be time enough. I suppose it would be time enough if we took three quarters of an hour or so to bring us back here at the time we recess for lunch. Would it be agreeable if we go over now until 2:00 o'clock?

Mr. Resnik: I have a witness here.

The Court: Can you put him on?

Mr. Resnik: I think I can. That is, if the petitioner rests.

Mr. Milton W. Dobrzensky: We have yet to produce two pieces of information on the two points before the witness' [153] testimony is concluded, and technically I don't suppose we could rest until then. We have nothing further to offer after the testimony of this witness is concluded, and in effect we have rested when his testimony is complete.

The Court: Won't that be satisfactory, Mr. Resnik? Obviously if you bring anything out on cross they would have a technical opportunity for redirect.

Mr. Milton W. Dobrzensky: We have no further redirect contemplated now. Mr. Turnbow's office is a block and a half away.

The Court: This occurs to me. Mr. Turnbow could go back now while we are hearing from this other witness and return here even before we recess.

Mr. Milton W. Dobrzensky: Yes.

Mr. Stacey H. Dobrzensky: May I suggest we take a brief morning recess and obtain—arrange with him with respect to getting the information.

The Court: You will need some time for that.

(Testimony of Grover D. Turnbow.)

Mr. Stacey H. Dobrzensky: Five minutes.

The Witness: I want to point out I don't know whether this information is here or——

Mr. Milton W. Dobrzensky: That is what I wanted to check.

The Witness: If it is at my office the answer is simple. If it is in Oakland, it will take a little time to go [154] get it.

Mr. Milton W. Dobrzensky: We will ascertain that with a telephone call.

The Court: It is really not necessary unless he needs the services of you gentlemen in finding that out, because I was going to suggest if he comes back here before 12:00 o'clock we could try to put him on. It is understood he will come back at 2:00, is that satisfactory?

Mr. Milton W. Dobrzensky: He will be able to be back before 12:00 or close by.

The Court: All right.

The Witness: I am sorry I was not here on Monday, your Honor.

The Court: It worked out all right.

Mr. Resnik: May we take a brief recess?

The Court: I thought not, but if there is anything to be served by it we can do it.

We will take a five-minute recess.

(Short recess.)

(Witness excused.)

Mr. Resnik: In light of the understanding reached before the adjournment for the recess, the respondent will now call as its witness Mr. Almand.

Whereupon,

WILLIAM C. ALMAND

called as a witness for and on behalf of the Respondent, having [155] been first duly sworn, was examined and testified as follows:

The Clerk: Will you please take the stand and state your name and address for the record?

The Witness: My name is William C. Almand—A-l-m-a-n-d. I work with the Western Can Company, San Francisco.

Direct Examination

Q. (By Mr. Resnik): How long have you been in the employ of the Western Can Company?

A. Ten and a half years.

Q. What is your present position?

A. Well, I am what they call their inside salesman. To be more specific, all the orders and productions are funneled through me before they go into the plant; either directly or I receive them personally, or come through somebody else and I get them.

Q. You were so employed by Western Can in 1948, 1949 and 1950? A. Yes.

Q. In substantially the same capacity?

A. That's correct.

Q. In fact, the same capacity?

A. That's correct.

Q. In connection with your services as an employee of [156] Western Can Company, can you describe briefly to us how orders passed over your desk, or passed through you?

(Testimony of William C. Almand.)

A. I would say that practically—well, maybe 90 per cent of all orders received for us—by us, rather, for manufacture and shipping of containers is verbal. Some are and some are not confirmed in writing. It is like any other business. You deal in good faith and you know who you are dealing with.

Q. Now, you are here in response to a subpoena served upon the company? A. That's correct.

Q. You have brought with you in response to subpoena duces tecum all the records of your company relating to can transactions during the years 1948, 1949 and 1950 with a company known as Continental Trading, Inc., as well as International Dairy Supply Company, is that correct?

A. That's correct.

Q. Now, in connection with the orders that came to your department in the name of Continental Trading, were those orders, or many of them, communicated to you over the telephone?

A. I would say practically all.

Q. With whom do you have contact in connection with those telephonic orders?

A. Well, as I recall, for the most part it was with Miss Palmer or Mr. Wickersham.

Q. At the time that an order came in over the telephone [157] did you take any steps to formalize that in accordance with your company's procedure?

A. Well, what do you mean by formalize?

Q. Did you write it up in a memorandum or in an order?

A. We immediately entered the order to allo-

(Testimony of William C. Almand.)

cate production and shipping programs, and so forth, and materials and so forth for their—for the particular order involved.

Q. This is the form?

A. This is the form we wrote the order up on.

Q. The witness is handing me a yellow form which appears to be a carbon copy?

A. That's right.

Q. A carbon copy of the original?

A. That's right.

Mr. Resnik: I offer this as Respondent's Exhibit.

Mr. Milton W. Dobrzensky: May we see it first, please.

Mr. Resnik: I am sorry. I thought you saw these.

Mr. Milton W. Dobrzensky: I don't know what you have reference to. We may have seen it.

The Witness: Could I ask the Court that these records be returned to us after they have served their purpose?

The Court: Well, that can be done. Serving the purpose may mean a matter of delay of quite a long time.

The Witness: I see. [158]

Mr. Resnik: If your Honor please, if any of these records are received in evidence I will ask leave to withdraw them at the close of the hearing here and substitute photostats and return the originals to Mr. Almand.

The Court: Normally we would stamp the fact

(Testimony of William C. Almand.)

that it was an exhibit on the document. Have you any objection to that?

The Witness: No, not at all.

Mr. Resnik: I will offer the exhibit referred to as Respondent's Exhibit next in order.

The Court: Any objection?

Mr. Milton W. Dobrzensky: No objection.

The Court: It will be received and marked in evidence.

The Clerk: Respondent's Exhibit No. D received in evidence.

(The document above referred to was received in evidence and marked Respondent's Exhibit No. D.)

The Court: I neglected to ask you, Mr. Resnik, about the second supplemental stipulation. That has no exhibits?

Mr. Resnik: That is correct. It has no exhibits.

Q. (By Mr. Resnik): I show you now, Mr. Almand, Respondent's Exhibit D, and we note thereon some writing in pencil, and referring first to the writing at the bottom, which apparently is a telephone [159] number, "KL 2-2833, Extension 6265, Resnik." That, I gather, was added much later than the time that this document was executed?

A. As I recall, you people have been calling from time to time through the years about these records involved here, and at the time we were looking at them—that is Mr. Wood's, Henry Wood of our company's writing, he just wrote which appears

(Testimony of William C. Almand.)

to be your telephone number to see what he could find or give you some information or something.

Q. Ignoring that part of the penciled writing, which happens to be circled, also will you look at the other penciled writings and tell me whether you can explain what the other penciled writing is?

A. Well, the number 100 serves Continental Trading purchase order number, which in turn, referring to——

Mr. Milton W. Dobrzensky: Would you speak a little louder?

The Witness: There is a number 100 on their order which refers to the customer's purchase order number, which is Continental Trading Company's number, designating a certain shipment for a certain time at a certain location calling for a certain type cans which is involved in this order. The other —there is some other penciled notations on here about paper lining the cans, lining the sides and floor of the car with paper. When you first start shipping cans for a customer you [160] have to go along—you learn these different specifications and you have to learn what they want, what those notations are, what are involved here.

Q. (By Mr. Resnik): This Exhibit D, as well as all the other orders of the same type, bear a date on them, do they not? A. That's correct.

Q. What is that date representative of?

A. That is the date that the order was received from the company involved, the customer.

Q. That is the communication over the tele-

(Testimony of William C. Almand.)

phone? A. That's right.

Q. And after that telephone order is received, was it, in the case of cans shipped on behalf of—in the name of Continental Trading Company, followed up by a written confirmation? A. Yes.

Q. Did those confirmations come in generally the following day?

A. There is no set time on them. They could be the next day or the next week or any amount of time involved when they got around to doing their clerical work. It was a matter of confirmation for a matter of record. Most large companies do send out purchase orders to confirm their transactions. It is a simple matter of keeping their records straight. When you do [161] a large volume of business and you try to remember all the transactions, verbally or orally, I think it tends to lead to a lot of confusion.

Q. Were you familiar with the type of cans that were being ordered? A. Yes, sir.

Q. Were you familiar with the fact that all of the cans were to be used in connection with the fulfillment of a contract with the armed forces in the Far East?

A. Yes, sir. I was aware of that fact, yes.

Q. In that connection, then, there was no billing for sales tax?

A. No. Food products in general do not carry sales tax.

Q. Now, was it necessary at that time for you, in order to obtain the raw materials necessary for

(Testimony of William C. Almand.)

the production of cans, to indicate to your suppliers that some of your products were being made in connection with the fulfillment of orders for the government or the Army?

A. Well, that's a rather broad question. We make many, many types of containers under many types of specifications. In this particular instance the government specified what type of materials were to be used for the products involved, and when we order plate *for* our supplier, the tin plate, that is, to fabricate these containers, it is ordered by size. In other words, we have to order tin plate sheets, which is by size, per [162] container to be fabricated. It takes from our mill supply—mill supplier 90 days usually to get raw materials.

Does that answer your question?

Q. Was there any shortage of raw materials at that time? A. At what time?

Q. 1948, 1949 and 1950?

A. No, not noticeably so. Well, let me qualify that. In 1950, I believe, is when the Korean War broke out, around August. At that time the government put restrictions on tin plate products. That didn't take effect until later in the year.

Q. I will ask you, Mr. Almand, if you would look at your records of the confirmation orders that you would write up and ask you when you received the telephone order with reference to a purchase order No. 102 of Continental Trading, Inc.?

A. 102?

Q. Yes.

(Testimony of William C. Almand.)

A. What do you want to know about it? Would you repeat the question?

Q. When did they telephone that order in to you? A. March the 21st, 1949.

Q. Now, with reference to purchase order No. 103, when was that telephoned in?

A. April the 4th, 1949. [163]

Q. What about purchase order No. 104?

A. April the 14th, 1949.

Q. When did you receive from Continental Trading the written confirmation of purchase order No. 104?

A. Well, I don't have a record of it. It was not stamped, no.

Q. It was not stamped? A. No.

Q. Did your company continue to supply the precise type of can after 1950 to International Dairy Supply Company?

A. Yes, sir, and I am happy to say we still do.

Q. Now, how is the price determined that your company charges for the cans here ordered?

A. Well, we have one price only for our containers of a certain type, of a certain specification. That only fluctuates normally due to increases or decreases and the cost to us of our mill supplies, which in the last ten years have always been up rather than down, and our labor and other raw materials, other than tin plate.

Q. As I gather it, there is a published price list for specific cans to the trade, and I suppose there is a customary discount of cash?

(Testimony of William C. Almand.)

A. One per cent.

Mr. Resnik: If your Honor please, I dislike very much having to encumber the record with a lot of orders from [164] this company and then have them photostated. I don't want to encumber the record, and I don't think we could afford the cost of photostating. I was wondering whether it would be possible for Mr. Dobrzensky and me to go over those orders and perhaps work out some agreement.

Mr. Milton W. Dobrzensky: If you tell me what you want to prove we may be able to stipulate to the fact. I as yet don't see the relevancy of any of this. If you tell me what you want to prove maybe we can agree to it.

Mr. Resnik: I am interested in proving the date——

The Court: Just a minute. Have you finished with this witness otherwise?

Mr. Resnik: Yes.

The Court: Well, now, wouldn't it be possible if we took a recess now that you could complete your agreement, whatever it is? We are going to have to wait and postpone the completion of the hearing until Mr. Turnbow gets back anyway. If we took a recess now and reconvened at 2:00 o'clock, couldn't you handle both of them?

Mr. Resnik: Yes.

The Court: In other words, I don't see any purpose to be served in a discussion on the record now of what you want to do, and so if you got together at a table with these documents you might very well

(Testimony of William C. Almand.)

be able to come to an agreement in a short time.

You say you have no more questions?

Mr. Resnik: No more questions of this witness, pending a determination of what can be done with reference to this.

Mr. Milton W. Dobrzensky: We will work out something with you.

The Court: Do you have anything?

Mr. Stacey H. Dobrzensky: I have a few questions that will take a very short time, and we can get that out of the way.

The Court: I think we should do that so he won't have to come back.

Cross Examination

Q. (By Mr. Stacey H. Dobrzensky): Mr. Almand, as I understand your testimony, these telephone calls from Miss Palmer and Mr. Wickersham were, in each case, followed by a written confirmation? A. Yes.

Q. And the written order is the one that is here?

A. Yes.

Q. I have in my hand Petitioner's Exhibit 33 which is a series of Continental Trading purchase orders addressed to Western Can. That would be the type of confirmation that followed each telephone call? A. That's right. [166]

Q. Was it unusual, Mr. Almand, to have orders placed with you in this manner, the manner in which they were placed by Continental?

A. Unusual in our business?

(Testimony of William C. Almand.)

Q. Yes.

A. No, that is common procedure.

Q. Was it unusual in your business to arrange for production or allocation of materials on orders on the telephone, advance notice, as was done in the case of Continental?

A. That is a common practice also. We are—our type of business is not such that—as in comparison to a retail business where you go in and say, "I want two of these," and they can serve you right there. We have to plan production and scheduling and materials according to what is involved to produce and ship, so forth. In other words, a week or so is involved after the advance notice.

Q. With respect to the shipments pursuant to the orders from Continental that came in the manner you described, do you know from your having dealt with them whether there was any pattern as to the designation, as to inside or outside the State of California?

A. As I recall, I think all of these cans went outside the State of California.

Q. I will show you Petitioner's Exhibit No. 34, which by my count is 92, that are Western Can invoices with a check [167] attached. You recognize them, I take it, as being the invoice for billing your company sends out when it fills an order?

A. That is correct.

Q. Were each of the invoices ordered by Western Can to Continental paid by Continental?

A. I couldn't answer that.

(Testimony of William C. Almand.)

Q. So far as you know?

Mr. Resnik: I will stipulate they were.

The Witness: I would assume they were.

Mr. Stacey H. Dobrzensky: Just one moment.

Q. (By Mr. Stacey H. Dobrzensky): I have one further question, Mr. Almand. If you know, did Continental Trading, Inc., or Mr. Turnbow, or International Dairy Association, or International Dairy Supply Company, have any interest or ownership in Western Can Company?

A. No, sir; not to my knowledge, anyway.

Mr. Stacey H. Dobrzensky: That is all.

Mr. Resnik: I have no questions.

The Court: Will you remain here long enough so that counsel can get from you whatever information it is they want?

The Witness: Be happy to.

The Court: You can be sure they have reached an agreement, and then if it is necessary we will call the witness for any further questions.

You may be excused. [168]

(Witness excused.)

The Court: We have nothing more before the lunch recess, have we?

Mr. Milton W. Dobrzensky: Nothing, your Honor.

Mr. Stacey H. Dobrzensky: I think, your Honor, if at least possible we would have stipulated about the matters Mr. Turnbow is digging out so that it won't be necessary to have a witness on the stand at 2:00 o'clock.

Mr. Resnik: I have asked that Mr. Turnbow return.

Mr. Milton W. Dobrzensky: Very good.

The Court: I think it was the understanding, though, that he was to return only for the purpose of answering those two questions.

Mr. Stacey H. Dobrzensky: Yes.

The Court: In other words, I don't want to project it all afternoon with some additional questions.

Mr. Resnik: I should be candid with the Court, and I think it is possible I may request the Court to give me the opportunity to ask more than that, but I would like to await his return.

The Court: This much has to be clear. There won't be any further opportunity given to go and collect more information. The whole purpose of handling it the way we did was to be sure any questions Mr. Turnbow was to look up, he would be told before we excused him from the stand. [169]

Mr. Stacey H. Dobrzensky: Merely to supply his answers to two questions, and that was it, as I understand it.

The Court: That was my understanding.

Mr. Resnik: If necessary, I can call him as my witness. We haven't concluded the presentation of our case as yet.

Mr. Stacey H. Dobrzensky: In any event, we will return at 2:00 o'clock and hope we have a stipulation, and Mr. Turnbow will be present. We will get Mr. Almand out of our hair.

The Court: What I am asking you to do is con-

sider seriously not extending the examination beyond what we originally contemplated.

We will take a recess until 2:00 o'clock.

(Whereupon, at 11:45, a.m., a recess was taken until 2:00 p.m., of the same day.) [170]

Afternoon Session, 2:00 p.m.

The Clerk: We will proceed with Continental Trading Company.

Mr. Milton W. Dobrzensky: Mr. Turnbow is here, your Honor, and has the information in response to the questions.

Mr. Resnik: May we complete the other matter that was pending before the Court with reference to some exhibits of the witness who was on the stand, Mr. Almand. Your Honor will recall that there was received in evidence Exhibit D, a copy of the telephonic order prepared by Western Can Company, and we asked leave to withdraw it and substitute a photostat, but that won't be necessary now. We will ask leave to withdraw not only that exhibit, but all other exhibits but the originals will be sent back to the court. We offer in evidence 83, or thereabouts, additional telephone orders of Western Can Company, which are the same type as Exhibit D, and we will offer the 83 as one exhibit.

Mr. Stacey H. Dobrzensky: May I have a look at them, Counsel, before we go further?

Mr. Resnik: Counsel saw these before lunch and during the luncheon recess.

Mr. Milton W. Dobrzensky: The slips behind, I don't know what they are.

Mr. Resnik: They were on the——

Mr. Milton W. Dobrzensky: That is all right.

Mr. Stacey H. Dobrzensky: If the Court please, we will object to the introduction of these. I don't see that they are relevant or material to any issue of the case. The fact of these transactions is stipulated to. The documents of the petitioner—in fact, the documents from the same company are already in the record establishing clearly the transactions at each point along the way, and I fail to see what purpose they serve or that they are relevant to any issue in this case, and I place our objection on that ground.

The Court: Do you want to be heard?

Mr. Resnik: If there is any doubt in the Court's mind as to its receipt, I certainly want to be heard, but I can't imagine the Court would not receive them.

The Court: Aren't these duplicates of originals that are in some other exhibits?

Mr. Resnik: No, they are not, your Honor.

The Court: Now, the originals of those would have been sent to Continental Trading?

Mr. Resnik: No, your Honor. I believe the witness explained that at the time an order is received over the telephone by his company the man at the desk, that being Mr. Almand would have prepared a form, which is now Exhibit D in evidence, an original and a carbon. For some reason or another, the originals are not any longer in existence but the carbons are here. [172]

The Court: Do we know what happened to those originals?

Mr. Resnik: Yes. Well, we didn't bring it out in his testimony because no question has ever been raised. The fact is that these are internal—these are merely internal papers of Western Can Company. One copy is retained in the sales department. The other goes forward to the processing of the order. After one of these is prepared, Mr. Almand testified, he would receive almost in every case, and I think in this instance in every case, the written confirmations from the company in support of the verbal telephone order.

Now, the company was able to produce, pursuant to a subpoena they bring all their records in, these as well as copies of some of the other documents, which are now in evidence but which we don't need. These documents which I offer as Exhibit E, and documents as Exhibit D, establish the time when the order was given to Western Can Company for the particular cans. It would be very simple for the court to tie together the copy of the telephonic order with the written order, because appearing on almost every one of the 82 sheets is a number at the top, 100 being the first exhibit, going to 101, 102, so forth, which are the numbers appearing on the purchase orders, Exhibit 35.

The Court: Do I understand your purpose in introducing these is to supply an element which doesn't appear otherwise?

Mr. Resnik: That is right. It doesn't appear any [173] place else in the record.

Mr. Stacey H. Dobrzensky: If the Court please, in the first place the stipulation sets forth there was telephone notification to Western Can for each one of the orders placed by Continental.

The Court: Does it say when?

Mr. Resnik: No. We received all this cumulative evidence here over my objection.

Mr. Stacey H. Dobrzensky: As I recall, and the language is before us, prior to the transmittal of the written order—it doesn't say how many days, no, your Honor. This witness' testimony covered these. These are internal records of Western Can. The exhibits counsel objected to are records of the petitioner and establish the points of these transactions. These documents never were sent to petitioner and never came to their attention. They are merely internal records of the seller of cans, whereas the other documents there, Petitioner's Exhibits 32 through 36, are petitioner's records of these transactions in the various ramifications of it, which, of course, they did have notice of and did have the use of.

The Court: That wouldn't make them inadmissible, and neither would it make them irrelevant. If the fact is that we have a good part of the history of the transactions here, but we don't have it all and these furnish some missing element, I don't see that that would indicate that they weren't [174] admissible.

They will be received and marked in evidence, one exhibit.

The Clerk: Respondent's Exhibit E is received in evidence.

(The document above referred to was received in evidence and marked Respondent's Exhibit E.)

Mr. Resnik: I would just like to make a statement in reference to that. It was quite clear when we adjourned here and I released Mr. Almand that there be no questions as to the receipt of the document or the data contained thereon, if I found time to make a schedule.

The Court: That may have been clear in some private conversation, but it was not part of the agreement we made here. The agreement was if counsel could stipulate that that could be used in lieu of Mr. Almand's testimony. It was under that assumption and he would be excused.

Have you anything further. now, on what would have been Mr. Almand's testimony?

Mr. Resnik: No, your Honor. That would complete Mr. Almand's testimony.

Mr. Stacey H. Dobrzensky. I was going to say I know Mr. Turnbow would like to get back to his affairs. He has the information on the two questions which he dug out of his records. One had to do with the settlement with Mr. Wenner-Gren, and the [175] dates of trips to Italy in 1948, 1949 and 1950. We handed counsel a written statement of that, but he prefers to have Mr. Turnbow give it from the stand, as I understand it.

Mr. Milton W. Dobrzensky: Mr. Turnbow.

Whereupon,

GROVER D. TURNBOW

called as a witness for and on behalf of the Petitioner, having been previously duly sworn, was examined and testified as follows:

The Witness: May I proceed to answer the questions?

The Court: Perhaps it would be better if Mr. Resnik puts the questions to you.

The Witness: Thank you.

Cross Examination—(Continued)

Q. (By Mr. Resnik): Mr. Turnbow, this morning I asked you whether you had had a settlement of your affairs with Mr. Wenner-Gren some time in 1950 or 1951, and you said you didn't recall, and you said you would check your records to see whether by checking your records you could refresh your recollection? A. Yes, sir.

Q. It is our understanding you have done so. Now, can you tell us whether you finally did have a settlement of your affairs with Mr. Wenner-Gren?

A. The answer is yes. [176]

Q. When did that take place?

A. I met him the last half of June in New York in 1950.

Q. Are you reading from something?

A. I have some notes. I dictated these to my secretary.

Q. Can you testify without regard to those notes? A. What did you say?

(Testimony of Grover D. Turnbow.)

Q. Can you testify as to these facts without regard to those notes?

A. The dates, I haven't memorized them, if that is what you mean. I would like to refer to my dates.

Q. You dictated this?

A. To my secretary since I left here and been back and she made a copy of it. The dates were taken off of my records at the office.

Q. You were telling us when?

A. Last half of June I met Mr. Wenner-Gren in New York in 1950, made a settlement with him.

Q. What occasioned the meeting and the need for this settlement?

A. I am sorry, I didn't bring that along with me. If I had it I—apparently it is a matter of Continental being no longer needed, at least I wasn't satisfied with it, but then I wouldn't—I don't know what occasioned it. He probably coming to New York have something to do with it, and I met him in New York. Let's see. I had a settlement with him, and I agreed to [177] surrender the 10,000 shares of International Dairy Association that I owned, which is 10 per cent of International Dairy Association, and in exchange for 5,000 shares of Electrolux stock. I don't know whether you asked for this or not, but then I reported the $10,000 investment in 1947, and I reported it and the stock at that time. At the time I made this deal it was selling on the market at a price of $55—$55,000, pardon me, $55,000. I had a gain in this transaction of $45,000.

(Testimony of Grover D. Turnbow.)

There is another part to this if you want it. You asked me about further settlement. Do you want it?

Q. Sure, I want the terms.

A. I was about to finish.

Q. Go ahead.

A. In addition, since I never had been paid for my services from Mr. Wenner-Gren in connection with the affairs, and since we were terminating our relationship, he agreed to pay me $50,000 covering three months of 1946, all of 1947, all of 1948 and 1949, and for the six months of 1950.

Now, I would like to make an addition to that, a correction from this morning. I told you I was paid a thousand dollars a month. I find in looking up that I was paid $1500 a month, and he agreed to pay me from July the 1st, 1950, to the end of the year a thousand dollars—$1500 a month, which he did for the last six month period.

Q. Now, you not only have the 5,000 shares of Electrolux [178] stocks, but you got $50,000 some time?

A. No, I got 5,000 shares of Electrolux which was worth $55,000.

Q. Then you get $50,000 in cash?

A. Oh, yes, that's right.

Q. In addition? A. That's right.

Q. Now, then, as I understand it——

A. Some of it I took a note for. I didn't get the cash then, see.

Q. Was the note ultimately paid?

A. The note was ultimately paid, that's right.

(Testimony of Grover D. Turnbow.)

Q. Now, there was one other matter we asked you about. You said you made a trip to Italy in connection with your activities, seeking to establish a recombined milk plant?

A. In November, 1948.

Q. And that was the only——

A. I was in Italy discussing that in November.

Q. That was the only trip you made to Italy in 1948, 1949 and 1950?

A. That's right. I testified this morning they came here after that, and in fact they had been here before that. This was the interim transaction.

Mr. Resnik: There is one other matter, your Honor. I would like to cover by a very few questions to the witness [179] which I could have covered this morning but inadvertently failed to do so. I could call the witness as my own, if I am required to; otherwise I can proceed in this order. It relates to one transaction covered by the stipulation to which I would like to refer for clarification, if possible.

The Court: What is your position about that?

Mr. Stacey H. Dobrzensky: Your Honor, I think we understood this morning we would bring him back for the answers to two questions he had to dig up from his records. Counsel can call him, and perhaps the best thing to do would be to get the job done, although I certainly hope they aren't questions that will require his going back and digging up more records and coming back again.

(Testimony of Grover D. Turnbow.)

Mr. Resnik: He was under subpoena to bring all the records of the company here.

Mr. Milton W. Dobrzensky: The subpoena was addressed to Mr. Turnbow and not to any corporation. You should have addressed the subpoena to the corporation when you want corporate records brought in. He is no longer an officer of Continental Trading. The subpoena was addressed to him as an individual, not as an officer of any company. We have the records here that are mentioned if you want them.

The Court: I am still not quite clear whether you want Mr. Resnik to be considered on direct examination from now on or whether you are satisfied to have him continue. [180]

Mr. Stacey H. Dobrzensky: I am satisfied to have him continue, because I think the important thing is that Mr. Turnbow wants to get through and get away, and as long as we don't have to go back and dig up further records it is all right.

The Court: Proceed.

Q. (By Mr. Resnik): Mr. Turnbow, in connection with your own activities and those of International Dairy Supply, and particularly as it related to the government contract to supply milk to the Far East, was it necessary for you to buy dry milk fats, dry milk solids, in this country?

A. Yes, sir.

Q. Did you or did International Dairy Supply at any time engage in buying and selling of dairy products on a commodity exchange?

(Testimony of Grover D. Turnbow.)

A. Would you repeat your question?

Q. I say, did you at any time or did International Dairy Supply ever engage in buying and selling of dairy commodities on the commodity exchange?

A. Supply Company you are talking about?

Q. Yes. A. No.

Mr. Stacey H. Dobrzensky: We object to that question as having no relation to any direct examination or any transactions that are here in the record or the stipulation. He is [181] inquiring, as I understand it, into his private business affairs.

The Court: All that would mean would be that if he wanted to ask the question he would make the witness his own witness now. If you want to go through that, that comes right back to what we were doing before.

Mr. Stacey H. Dobrzensky: All right.

The Witness: I should qualify that by saying you are asking me quite a question. As far as I know, there were none because there was no reason for selling them, no reason why Supply Company couldn't do it. But to my recollection, I don't recall of them being sold.

Q. (By Mr. Resnik): Now, we have in the record here the fact that there was purchased from Continental Trading Company a carload of butterfat from the Kraft Company in July of 1948. Are you familiar with that transaction?

A. What form was it in?

Q. Perhaps you can tell us.

(Testimony of Grover D. Turnbow.)

Mr. Milton W. Dobrzensky: If you are referring to a document in the stipulation, which stipulation he has never seen, I suggest it be shown to him.

Mr. Resnik: I am not referring to any documents. I am asking the witness what he knows about this, if any.

Q. (By Mr. Resnik): Do you have any knowledge? [182]

A. You are asking me to recall every transaction that has been made for years back from memory, sir. We make thousands of them. I don't know the one you have in mind. If you will help me identify it maybe I can help you get the question answered.

Q. I will show you Exhibit—— A. Fine.

Q. I will show you Exhibit A in the record, which is the tax return of Continental Trading, Inc., and there is your signature, I believe, as president? A. That's right.

Q. Under Schedule D, appearing on page 2, we see a transaction, one car of butterfat acquired 7/12/48?

A. I can tell from the price, $40,000, is that right? That is anhydrous, 98 per cent pure fat. That is not butter; that is not cream. That is anhydrous fat.

What do you want to know about it?

Q. Are you familiar with that transaction?

A. It says so on there. There must have been one, yes.

(Testimony of Grover D. Turnbow.)

Q. You have no knowledge other than what appears on the tax return at this moment?

A. I wouldn't want to say I don't have, but I don't have specifically, if that is what you mean, because it shows we sold the—Continental sold their —did they purchase? Is that a purchase? [183]

Q. Well——

A. I think I know what you mean. Let me see what you have got, will you? Guessing is dangerous business here. I hate to guess at these damn things—pardon me, your Honor.

Yes, there is a loss on it. I know the time we made the loss. We bought a car of butterfat on the butter market, and the market went down. Anhydrous fat is tied to the butter market, and we sold it rather than hold it because the keeping quality wouldn't be indefinite enough—good to hold it back for next year. Is that what you want to know?

Q. Did you, as an individual, ever engage in transactions similar to the one you have just described?

A. That is the only one I think I lost money on. It isn't my intention to lose money, but occasionally I do. I think that is the one in my life. That is the only car I lost money on, and that is because the market changed, but that isn't the first time I lost money.

Q. Did you, as an individual, engage in similar transactions on your own?

A. No, I told you that. We make—anhydrous fat is made for making reconstituted milk and

(Testimony of Grover D. Turnbow.)

shipped to the Far East. I had a contract with the United States Government, and I didn't lose money and that is the only car I told you I lost any money on. I am sure that is. I don't think I would be foolish enough to do the same thing twice. [184]

Q. Could you have used the anhydrous fat covered by this transaction in making recombined milk?

A. Not at the time of that transaction because the recombined plants weren't in operation. That is way back—that is in '48, isn't it?

Q. Yes.

A. All right. It was made by Kraft. Kraft don't make our product any more, see.

Q. When were you familiar with the fact that your contract with the Army was of July, 1948?

A. July, 1948, and the Army contract had nothing to do with anhydrous fat. It has to do with recombined milk. I can sell it any place I want in the world or the United States. There is no relationship at all. That had nothing to do with Supply Company.

Q. Didn't you say before that that anhydrous fat is one of the ingredients or one of the necessary elements in the making of recombined milk?

A. And recombined ice cream and making of chocolate milk, and many other products.

Mr. Resnik: I have no further questions at this time.

The Witness: Obviously he is not a dairy man.

(Testimony of Grover D. Turnbow.)

Mr. Stacey H. Dobrzensky: No further questions.

Mr. Milton W. Dobzensky: May the witness be excused [185] now?

Mr. Resnik: Yes.

The Witness: Thank you.

The Court: Thank you.

(Witness excused.)

The Court: Is that the petitioner's case?

Mr. Stacey H. Dobrzensky: That is the petitioner's case, yes.

Mr. Resnik: The respondent rests, your Honor. I think my request to withdraw the exhibit is clear in the record now.

The Court: I am not clear about it. As I understand it, you want to withdraw them, but you don't want to photostat them, and you will return the original.

Mr. Resnik: I will return the originals in order that we can use the——

The Court: Where does that leave poor Mr. Almand? You told him this morning, in my presence, whatever you took from him you would photostat and return the originals to him.

Mr. Resnik: Mr. Almand and I had lunch and he decided that maybe the simplest thing would be for him just to let the Court have them and get them back when he can, because the burden of preparing a schedule is too great.

The Court: Well, I hope that you will undertake to keep him advised, then, of when he will be

able to receive them [186] back. I had better leave it up to you.

Mr. Resnik: The government makes a request when a case is finally closed to have all the exhibits withdrawn that we put in, and I think the Court then releases them to us.

The Court: That is not by any means automatic and very often doesn't happen, so I am asking you to take the responsibility to see it does happen in this case, and when you do get them back to see that he gets them.

Mr. Resnik: I certainly will.

The Court: Thank you.

The Clerk: As I understand it, your Honor, he is withdrawing also Exhibits 32, 33 and 34?

The Court: He wants permission to withdraw them.

Mr. Resnik: Yes, permission.

The Court: Of course, if it is possible for counsel to arrange to combine that operation, it is that much simpler when you withdraw them; make them available.

Mr. Stacey H. Dobrzensky: The exhibits counsel is requesting we will not have a need for, and so that we have no objection to his withdrawing them with your Honor's permission and returning them.

The Court: All right. It seems to me if he is going to refer to them and presumably is in his brief, they ought to be available to you if you want to see them.

Mr. Stacey H. Dobrzensky: That is correct. [187]

Mr. Resnik: They will be here in San Francisco, and we will be happy to make them available.

The Court: I will leave that to you.

Mr. Resnik: I don't think there will be any problem.

The Court: I don't think so either.

What about briefs?

Mr. Resnik: Does the Court have any pleasure as to the type of briefs? In any event, I would like to ask for more time than is permitted under the rules.

The Court: I always prefer to have simultaneous briefs. I don't see any reason for deviating from that in this case unless there is a special request. How much time do you want?

Mr. Resnik: I would suggest 90 days for the opening briefs.

The Court: Do you have any objection?

Mr. Stacey H. Dobrzensky: No objection.

The Court: How much time for reply?

Mr. Resnik: At least 30 days.

The Court: 90 days for the original brief, 30 days thereafter for each side to reply.

Will you read those dates?

The Clerk: The original brief will be due December 31, and the reply brief will be due January 30.

The Court: Are you sure that is right? [188]

The Clerk: No.

The Court: November 30. I think, as a matter of fact, that is cutting them off by one—I guess that is right, November 30 and December 31.

November 30 for the main briefs, December 31 for the reply.

Is there anything further?

Mr. Resnik: Nothing further.

Mr. Stacey H. Dobrzensky: Nothing further, your Honor.

Mr. Resnik: I want to thank your Honor.

The Court: Thank you, gentlemen.

It is submitted, and that concludes the present tax court hearing in San Francisco.

(Whereupon, at 2:35 o'clock, p.m., the hearing in the above-entitled matter was closed.)

[Endorsed]: T.C.U.S. Filed Sept. 17, 1956.

[Title of Tax Court and Cause.]

TRANSCRIPT OF PROCEEDINGS

Court Room No. 2, Internal Revenue Building, Washington, D. C., Wednesday, November 27, 1957.

(Met, pursuant to notice, at 11:45 o'clock a.m.)

Before: Hon. Clarence V. Opper, Judge.

Appearances: Fred R. Tansill, Esq., 824 Connecticut Avenue, Northwest, Washington 6, D. C., appearing on behalf of Petitioner. John R. Moodie, Esq., (Hon. Nelson P. Rose, Chief Counsel, Internal Revenue Service), appearing for Respondent. [1]*

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

Proceedings

The Clerk: Docket No. 55212, Continental Trading, Inc.

Will you state your appearances, please?

Mr. Tansill: Fred R. Tansill, for the petitioner.

Mr. Moodie: John R. Moodie for the respondent.

The Court: Proceed, please.

Mr. Tansill: I would like to say first I have at counsel table with me Mr. Edward Leon who is not admitted to practice in this court, but is a member of the bar of various courts including those in New York State and the District of Columbia. He is co-counsel in the case.

The Court: You say he is co-counsel in this case?

Mr. Tansill: He is associated in the conduct of the case. He has not entered an appearance in the matter. I simply asked him to sit at counsel table with me, unless your Honor objects.

The Court: It is probably not very important. I don't think you can refer to him as co-counsel.

Mr. Tansill: Very well, I will withdraw the remark.

Now, if your Honor please, we have for consideration this morning a motion filed, or I should say a motion lodged with this court on November 19. That motion is for leave to file a motion to vacate the decision to reopen this [2] proceeding and to take further testimony.

In this particular case, which is Continental Trading, Inc., Docket 55212, a decision was filed in this Court on December 4. The substance of the decision is to the effect that this corporation is a

cusable neglect; (2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59-B. Fraud, the judgment is void, the judgment has been satisfied, released or discharged, and finally, any other reason justifying relief from the operation of the judgment.

I have also referred to the work by Mr. Flaherty here entitled, C. Practice Manual, with forms, which relates to the District Courts of the District of Columbia, published in 1950. I find in Section 2412 the statement that a new trial will be ordered where there are new and material facts [5] which have come to light since the trial. Obviously this was an author's statement.

I find, also, a statement in a District Court decision, Ishikawa v. Acheson, decided by the District Court in Hawaii, 1950, reported at 90 Fed. Sup. 713; just the one sentence from that: Again this involves a situation of ordering a new trial. It said, quote, "the showing of alleged newly-discovered evidence and supported motion for new trial need not present an air-tight case. It suffices if a showing is made of sufficient new facts to afford a basis for believing that, given an opportunity, the concrete proof could reasonably be expected to cover the gaps and to fill in the details."

We feel that that quote is very close to our situation. So we approach now the second question, what would be the effect if this Court would grant this motion?

The case of Simon v. Commissioner, reported at

176 Fed. 2nd 230, see decision of the Second Circuit in 1949, holds in effect the granting a motion for leave to file a motion for reconsideration suspends the running of the appeal period and leaves the matter entirely open.

I understand, on the basis of conversations with *represents* of the chief counsel that they adhere and follow that rule.

So, now we arrive at the merits of our motion.

Our position is simply this: That either through mistake or inadvertence, or under the doctrine of newly-discovered evidence, and even upon the broad general ground of an unjust result, our motion should be granted.

We say this fundamentally because we believe there has been discovered relevant and material new facts which were not adduced at the hearing before this Court. Specifically, facts which relate to the conduct of activities in the United States during the taxable years by or on behalf of this taxpayer.

In addition, we believe that some of this new evidence tends to contradict various evidence submitted in the Court.

Finally, we believe that this new evidence, if permitted, would fill in the gaps and details, and show the purpose and the operations of petitioner in a somewhat different light than was presented to the Court. We would say here that there has been a mistake, or perhaps more accurately a misconception of what the real legal issue was in this case which had the inevitable result of the presentation

of the evidence, and I refer specifically to the position of counsel in the prior trial who apparently, if his opening statement, his brief, and his motion for reconsideration are to be believed, took the position that he did not have to show as a matter of law that Continental [7] Trading, Inc., was engaged in the trader business in the United States.

Your Honor, of course, held to the contrary, but the significant thing to me is having conceptually approached the problem the way he did, it is perfectly understandable why other evidence was not presented.

To illustrate, minute books, correspondence files, account books, officers and directors of this corporation were not resorted to.

Now, I am perfectly aware that in a sense this cuts two ways. It may be perhaps argued that this merely illustrates lack of due diligence on the part of prior counsel. However, I would take the position that what we are talking about here really is mistake or inadvertence, which perhaps gets blended with the concept of newly-discovered evidence, but in any event, whatever these distinctions may be we have a profound conviction that if additional evidence were permitted to be offered in this case, it might well convince your Honor to a contrary result on a factual basis from that which was initially reached by this Court.

I might say if your Honor is willing to hear them, I have available in court two of the officers and directors of this company who were in those capacities during the tax years. One of these

gentlemen, Carlos Grenninger, [8] is here from Mexico City. He actually kept the books and records in his own hand during these years. He was not a witness at the prior hearing.

I have also Mr. William A. O'Connell, who for many years has resided in Mexico, and was an officer and director in this company, and familiar with its operations and background.

As my motion indicates, Mr. Axel L. Wenner-Gren, himself, would be willing to testify in a proceeding relating to this company, and in fact would have testified at the prior hearing had he been requested to.

The Court: May I interrupt you at this point?

Mr. Tansill: Yes, sir.

The Court: I don't want to get into all the things that you have spoken about, but I fail to find that statement in Mr. Wenner-Gren's affidavit, that he would have appeared.

Mr. Tansill: Near the bottom of the first page: "I was not advised of the pendency or hearing held in the Tax Court of the United States in this connection, nor was I invited to testify as a witness. Had I been invited to testify as a witness, and had I testified, I could have been able to present additional evidence bearing upon the issues presented to the Court."

The Court: Under the circumstances, with all the [9] infirmities there are in your position, I am pointing up the fact that there is no statement under oath that he would have appeared, or even that he would appear in a new proceeding.

Mr. Tansill: That was certainly the clear intention of the affidavit, your Honor.

I personally helped prepare this affidavit in New York about two weeks ago in the presence of Mr. Wenner-Gren. If it fails to reflect the fact, it is due to my draftmanship.

The Court: Are you telling me now I ought to do something now on account of the inadequacy of the present counsel?

Mr. Tansill: No. I am simply trying to clear up the point your Honor raised. I have the verbal and personal assurance of Mr. Wenner-Gren, if this case is set he will testify.

The Court: I just think that the laxity in the entire conduct of this is now being reflected anew. This is presumably a serious proceeding, a serious motion, and what I would consider to be the most vital statement at all isn't made.

Mr. Tansill: Well, your Honor, again I must confess, we have done this under terrible pressure of time. As I pointed out we were retained in mid-October to prosecute [10] an appeal, and Mr. Wenner-Gren——

The Court: I am sorry I interrupted you.

Mr. Tansill: That is all right. I am trying in a sense trying to justify my own lack of carefulness in the preparation of these papers. We have been under considerable pressure of time in trying to get people from out of the country here to try to ascertain the facts. I can assure you verbally, whatever that is worth, Mr. Wenner-Gren has told me personally, had he been asked to testify in the

prior trial he would have done so, and if a new trial is granted here he will testify. He will be anxious to justify and explain what is involved in this case.

He also, I might say, feels that an inadequate and in part an inaccurate story was given to the Court.

The Court: Proceed, please.

Mr. Tansill: Now, at this time, if your Honor wants to, I have two witnesses, if you care to hear briefly from them.

The Court: No, I don't think that is any way to present a motion.

Mr. Tansill: Then, if your Honor will hear me, I would like to indicate rather briefly and quickly some of these items of newly-discovered evidence we are talking about, and perhaps put this thing in focus.

The Court: Do they appear in the motion papers?

Mr. Tansill: No, they do not, your Honor.

The Court: Unless Mr. Moodie wants to agree they are facts, I don't think that they——

Mr. Moodie: I couldn't agree to that, your Honor. because I don't know what they are.

The Court: It seems to me the motion, specially the motion considered——

Mr. Tansill: The motion as it is there has been newly-discovered evidence. This comes in that category I am talking about now. We didn't have exact knowledge of what we were going to discuss today when that motion was prepared. Primarily, it

has been discussed and developed in the last two days.

The Court: I am aware of the situation dealing with the dates involved here, but in a way this again exaggerates the difficulty that exists in this whole situation.

Now, you, as I understand it, were retained early in October. This motion wasn't even made until the middle of November. We are now right up against the cealing as far as the jurisdiction of the Tax Court is concerned. It seems to me it would in effect be encouraging dilatory proceedings to say that anything ought to be done now which would extend that period of finality.

I recognize it might take time to get into a case like this, but I think I suggested that that indicates the [12] infirmity of this whole position. I have to take things for granted if I am going to accept your position, I have to take things for granted that are presumably an essential part of the considerations on the basis of which any motion like this could be granted.

Mr. Tansill: Well, may I say this, your Honor? Realizing, as I did, the potential defectiveness of my position, in the sense I couldn't spell out there the facts I am talking about, I asked the two gentlemen to be here available today, so you wouldn't have to take my word for it, so if you cared to you could hear their sworn testimony. And I would suggest it would come under the broad language I attempted to use, namely, that there is newly-discovered evidence.

The Court: Well, unless Mr. Moodie has a feeling that he wants to have it done, I still don't believe that is the way to do it.

Mr. Moodie: No, sir, your Honor, we would object to that.

Mr. Tansill: Well, will your Honor permit me to make a proffer of proof as to what these gentlemen would say in essence if they were called to testify?

The Court: I don't suppose I can prevent you from making an offer of proof, but certainly the purpose of an offer of proof is not the purpose that you are dealing with [13] in this case.

Mr. Tansill: As I understand it, your Honor, I conceivably and admittedly have the burden of trying to convince your Honor to exercise discretion in granting the motion. I think the basis of the motion is some mistakes have been made.

The Court: May I interrupt you?

Mr. Tansill: Yes, sir.

The Court: You are asking for a further hearing?

Mr. Tansill: That is right.

The Court: Before I grant a motion for the further hearing, you want me to have the further hearing in effect. When I say no, I don't think over Mr. Moodie's objection I should do it, you make an offer of proof which is the kind of thing you do in a hearing or trial, because you think the judge has made a mistake and refuses to take the evidence, and you want to preserve it for appeal.

Now, as I say, I can't prevent you from doing it;

but I don't think it take the place of an affidavit.

Mr. Tansill: Following that suggestion, if your Honor wishes, I can have affidavits prepared and submitted this afternoon from these gentlemen.

The Court: Then I would have to say I will have to continue the motion until next Wednesday, to give Mr. Moodie an opportunity to see them. You couldn't ask me to [14] take the next party, without hearing from him?

Mr. Tansill: I probably could ask it. Whether it would be in good order is another question.

It seems to me, I having the burden here, should be permitted to try to bring to your Honor's attention any relevant facts that bear on the question of has a mistake or an inadvertence caused a miscarriage of justice? That is all I am attempting to do under the time limitation.

Mr. Moodie: Your Honor, we take the position that the motion on its face is what we are arguing today. We don't know anything about anything else other than what is in the motion. We are prepared to argue on the motion as filed and called for hearing.

The Court: I think that is the only fair position to take. That is the purpose of making a motion, the purpose of giving notice, the purpose of filing supporting papers. It is true that you have the burden, but so you did from the very beginning.

I would think that Mr. Moodie is correct in saying that if he is to meet anything else, he has to be given an opportunity to meet it.

Mr. Tansill: How else, under these circumstances,

can I get to your Honor's attention the real meat of the problem here, namely, what new evidence we say should be considered? [15]

The Court: The only practical way that I can think of is the one I just suggested. If you want to have the motion continued, if you want to file further supporting affidavits, and Mr. Moodie has no objection, then we will come back a week from today with the material at a point where he has seen it and is able to meet it. That is the only practical thing I can think of.

Actually, as you know, this motion would never have been set for today if it hadn't been for your special urging and for the acquiescence of the respondent. I wouldn't think of having the Clerk give a notice as short as this, in a case that originates in San Francisco.

Mr. Tansill: We are aware of that, your Honor. Everybody has been most cooperative.

Admittedly, we are under a time difficulty. The principals involved here are all out of the country. It is simply a matter of having first gotten into the case, you begin to get some questions, and then you try to get the people there, and it takes time. This is simply explanation, not justification.

Well, perhaps, the solution then is to arrange to take affidavits from these gentlemen, and submit them to government counsel today, and if possible, then continue this motion until this day next week, realizing it is the same day our period expires. We will have to have the papers [16] ready, in the event that motion is denied.

Mr. Moodie: We find it very reluctant to continue the case, we are prepared to argue the motion as filed. We know nothing about the evidence other than set forth in the motion and affidavits attached now. I would object to the continuance of the hearing until next week.

The Court: Offer the objection, and under the circumstances, there is nothing I can do about it.

Mr. Tansill: We have the anomalous situation where the government tells us they know nothing else, and yet we have the people here who can tell them about it, and yet they object to hear it.

The Court: The government said to you as I understand it, you get the motion up, we will hear it and consent to short notice. Now, you are coming in and saying the motion wasn't completed in time, in effect it seems to me that is what you are saying. A motion is supposed to be supported by some kind of adequate material to justify the granting of the motion on the facts shown, at least the prima facie showing. I don't say that the affidavits would necessarily—would be final proof of what was in them, but at least there would be something in the record. Now, there is nothing in the record.

Mr. Tansill: There was that general statement in there we had newly-discovered evidence, and we tried to do the best under the circumstances, to produce the witnesses [17] that would indicate that to us. It seems to me if you are willing to take their affidavits, it would be proper to hear their testimony.

The Court: I am not willing to take their affidavits excepting—I made the suggestion on the assumption it would be acquiesced in. If Mr. Moodie objects, I certainly am not going to hear the motion. He went to a good deal of trouble coming here today, and prepared at your request on short notice, and now you are asking him to reverse the field, so to speak, and wait another week until you get the adequate papers in. So if the government objects, I can't order a continuance.

Mr. Tansill: Do I understand government counsel still to object?

Mr. Moodie: Yes, we object, your Honor.

Mr. Tansill: Well, under those circumstances, if your Honor will permit me, I would be inclined to try to make a proffer of proof here.

The Court: As I said before, I can't prevent you.

Mr. Tansill: Well, at the risk of offending your Honor I would like to make such a brief proffer.

The Court: Very well.

Mr. Tansill: The opinion your Honor has already entered indicates the importance of Mr. Turnbow to the Continental Trading Company. He, in effect, was their [18] principal agent in the United States during those years.

Some of the things Mr. Turnbow didn't discuss in his testimony in this court conceivably are matters about which he knew nothing. On the other hand, some of them are matters of which he personally had knowledge and conducted various negotiations. To illustrate: In 1949, a Mexican race track,

known as the Hippodrome, was owned and controlled by Continental Trading. Mr. Turnbow, as I understand it, conducted extensive negotiations in the United States during 1949 in an attempt to sell that asset. As a matter of fact, it wasn't sold as a result of those negotiations, but it later was sold through the activities of others.

Again——

The Court: May I interrupt you a moment?

Mr. Tansill: Yes, your Honor.

The Court: I will try not to, but I like to help. Do I understand that is one of the things you are relying on as evidence that would be testified to by these witnesses?

Mr. Tansill: Yes, your Honor.

The Court: That Turnbow conducted the negotiation?

Mr. Tansill: Yes, sir.

The Court: He was on the stand in this proceeding and never mentioned it.

Mr. Tansill: That is right.

The Court: This is what you call newly-discovered [19] evidence?

Mr. Tansill: Yes, sir.

The Court: Thank you.

Mr. Tansill: There are about 7 or 8 instances of this type of thing.

Turnbow and others also negotiated and attempted to sell a subsidiary corporation of this Continental Trading Company, known as Bank Continental, in the United States. This was a wholly-owned subsidiary and the negotiations were

conducted in the United States by agents of Continental during 1949.

The Court: Who are those agents?

Mr. Tansill: Who were the agents?

The Court: Yes.

Mr. Tansill: Mr. O'Connell was president of that bank, and personally conducted money for those negotiations in New York City.

The Court: I thought you were talking about negotiations conducted by Continental Trading.

Mr. Tansill: Through Mr. O'Connell who was an officer and director of that company.

The Court: You said of the bank.

Mr. Tansill: Also, he was president of the bank as well.

The Court: I didn't know that. You said he was an [20] officer of the corporation.

Now was this supposed to be a matter that Mr. Turnbow did know about or didn't?

Mr. Tansill: He knew about it, your Honor.

The Court: I am going to ask you this question, because I think maybe this really may be the crux of this whole thing.

You say this is newly-discovered evidence, newly discovered by whom?

Mr. Tansill: By me.

The Court: By you?

Mr. Tansill: Yes.

The Court: Thank you. You weren't even counsel in the case?

Mr. Tansill: That is correct, your Honor.

The Court: Thank you.

Mr. Tansill: By me in my capacity as present counsel in the case.

The Court: You are not saying it was newly-discovered by the client, or even by the prior lawyer?

Mr. Tansill: Certainly not the latter. As to who discovered it first, Mr. Wenner-Gren, I think, initially raised the question with me, and that provoked a search.

The Court: I am not making myself clear.

The client in this case, I meant, the Continental [21] Trading, Inc., the corporation.

Mr. Tansill: Yes, sir.

The Court: You say it was not known to the corporation at the time of the prior hearing?

Mr. Tansill: Well, the corporation is an artificial person, your Honor. Whether the corporation, through its officers knew about this, it is obvious to me at least some of the officers knew about it, namely Mr. O'Connell, Mr. Grenninger, both of whom were officers and directors. This is not new information to them, they knew it all the time. I suspect Mr. Turnbow knew it. Why he didn't testify to it, I suspect again goes back to the——

The Court: You know Mr. Turnbow knew it, because the first one, you said he actually conducted it. The second, you represent he did know about it. I can't recall offhand whether Mr. Turnbow was an officer of the corporation at the time we had the hearing.

Mr. Tansill: He was president during those years, I think.

The Court: At one time.

So I again want to bring you down to the focus of the question. Is it really newly-discovered by anybody but you?

Mr. Tansill: Perhaps that is a fair statement, although certainly it depends on how you interpret "newly-discovered", I may say. [22]

The Court: I am going by what I think the cases show.

Mr. Tansill: I hope we don't rely exclusively on this concept of newly-discovered evidence as a separate little category. We are talking about something rather broad here. Whether it is a mistake, or inadvertence in presenting the case originally, encompassed within an element of newly-discovered evidence, I think we do. So perhaps——

The Court: You don't mean by mistake, do you, a mistake in legal theory?

Mr. Tansill: I do in part.

The Court: Do you know of any case in any jurisdiction anywhere at any time that has ever held that that was a ground for a new trial?

Mr. Tansill: In the civil area.

The Court: Not talking about the criminal cases, —even fraud cases but——

Mr. Tansill: I have not been able to find any, simply because I have not had an opportunity for research of that kind.

The Court: I would be very surprised if you were able to find one.

Mr. Tansill: Well, the word "must" have some significance, as must inadvertence. I suppose it

would be fruitless to speculate as to what they might mean. [23]

The Court: There is such thing as carelessness, if a lawyer has a paper on his desk and does not put it in, that would be inadvertence. But to proceed on the case on a wrong legal theory, and ask the Court when it is all over, and new counsel has been substituted to over turn the whole thing and start all over again, I would be interested if you could find such a case.

Mr. Tansill: I would like to look for it, your Honor.

There is another aspect that I had hoped to shy away from. It is possible that there is a conflict of interest here on the one hand between Mr. Turnbow and Mr. Dobrzensky, as opposed to Continental Trading and its interested beneficial owners.

I am told here had been a falling out at one time between Mr. Turnbow and Mr. Wenner-Gren. I am not in any position to judge whether that had a bearing on Mr. Turnbow's testimony. All I know is what I have been told, namely, that there has been some disagreement between them, and of course we have the possibility that Mr. Turnbow was the president, and Mr. Dobrzensky as another officer in that company conceivably could be under the impact of fiduciary liability should this company be unable to pay its deficiencies.

I suppose there is a potential transferee situation [24] here some place.

I understand that Continental has no assets in the United States today.

Now, I simply raise these to indicate that there may have been possible conflict of interest at the time of the testimony in this case. I can't contribute anything more on that, other than to state it.

If your Honor will hear me, I have a few more——

Mr. Moodie: Your Honor, it seems to the respondent that sort of thing goes beyond the scope of this motion, or leave to file a motion.

The Court: I think we can make better progress, Mr. Moodie, if you let Mr. Tansill complete his statement.

Mr. Moodie: Sure.

Mr. Tansill: In 1949, again there was an attempt to sell another asset in the United States, namely the Pan American Trust Company, which was owned beneficially or controlled by Continental Trading. The negotiations again were conducted in New York City with New York banks.

Once again, in 1949, Mr. Turnbow conducted negotiations with Tidewater in the United States in an attempt to get them into the oil business in Mexico under the auspices of Continental Trading. I am told these negotiations were fairly extensive in 1949.

Also, Mr. Turnbow, I am told, tried to interest [25] Continental in buying the stock of the Golden State Dairy in California during this period. That Golden State Dairy, I understand now, is merged into the Foremost Dairies, of which Mr. Turnbow is now president, one of the largest milk combines in the world.

Now, in 1948, Continental loaned in excess of $600,000 to two of its subsidiaries in Mexico to permit them to purchase dehydrated milk powder in carload quantities in the United States.

Now, to explain this very briefly, you should realize that Continental Trading was a mother corporation. It had over a dozen operating subsidiaries in Mexico, ranging from banks, finance companies, cement plants, race track, and half a dozen milk companies. So it is active—so its activities are not wholly milk, is the point I would like to make, and they implemented, under the original intention with which this company was created, the activities of all their subsidiaries. They actually made possible the purchase of milk products in the United States by these direct loans or indirect loans to several of their Mexican subsidiaries in 1948.

Again, in 1948, negotiations were conducted in New York City with a factor to negotiation alone—a loan of $350,000 in connection with milk operations in Mexico.

Mr. O'Connell as I understand it participated in [26] those negotiations.

Now, finally—I don't intend to labor this much—during these years, '48, '49, and '50, there was going on a continuous series of negotiations conducted in the great part by Mr. Wenner-Gren himself. This was an attempt to merge the two largest telephone companies in Mexico into one concern. One of these companies was a subsidiary in part of United States interests, the International Telephone and Telegraph Company. The other one was owned pri-

marily by Swedish interests. Over a period of three years, and under specific authorization as shown by the minutes of the Board of Directors of Continental Trading, Mr. Wenner-Gren negotiated in Sweden and in New York with the various interests, and finally culminating these three years of negotiation, in 1950 the acquisitions and mergers were consummated.

In the process of doing this, Mr. Wenner-Gren visited the United States on several occasions, and negotiated extensively with the parent U. S. corporation.

I don't like to suggest that this is the entire story that could be pieced together if given more time. I simply would like to point out that these are some of the indicia that we have uncovered recently of activities, either for or on behalf of Continental in the United States, that go to the question of, was the degree of activity by [27] Continental sufficient to constitute doing a trader business?

I would conclude by saying over and above this there has been no testimony at all to indicate the circumstances under which Continental came into existence. That could be testified to, its purposes, and briefly those were the outgrowth of a Swedish milk corporation activity which was later sponsored by UNICET, under U. N. Auspices, that this was part of an implementation of a program to furnish dehydrated milk products around the world to needy areas. That was one of the principal purposes in back of the formation of this company, and could be testified to by a number of witnesses.

With that, I will conclude.

The Court: Thank you.

I am not going to go into this further, Mr. Moodie, unless there is something you want to say, but I want to ask you what your position about the motion is. You are not prepared to agree to it?

Mr. Moodie: No, we are not. We oppose the motion, your Honor.

The Court: I am going to deny the motion.

The whole situation seems to me not to indicate that we could even get beyond the motion for leave. The motion that is proposed to be made doesn't accord with the rules of the Tax Court; particularly Rule 19, which provides [28] that motion for further trial, and so on, shall not be combined with a motion to vacate a decision.

There is a clear implication in the rules, at least, that the engaging of new counsel is not a reason for doing away with a time limit which otherwise appears in the rule. That is the result of a combination of rules 19, 20 and 27.

This, as a matter of fact, is not even the first motion made to vacate this decision in this proceeding. Possibly that is the reason for the rule. There is not even any reference to this prior motion to vacate, although I am sure we all were aware of it.

But if this motion were granted, it seems to me, it would, for no reason other than the substitution of new counsel, it would make it possible for the cases in Tax Court to be indefinitely prolonged, to be reopened, or innumerable motions to be made, first on one ground, and then on another, for the

effect to be to delay the time when appeals have to be taken, which, of course, would be soon in this case. I don't mean to say I am covering all the difficulties that I see in this motion, but most of all it seems to me that the basis has not been laid for the granting of the underlying motion, even if the motion to file were granted.

Under all the circumstances, I just am unable to see that the petitioner has made an adequate case.

The motion will be denied.

Mr. Tansill: May I thank your Honor anyway for your consideration in setting it down for an early date, and also the Bureau counsel.

The Court: There will be nothing further I take it?

Mr. Tansill: No, your Honor.

(Whereupon, at 12:28 o'clock p.m., the hearing in the above-entitled case was concluded.)

[Endorsed]: T.C.U.S. Filed Dec. 4, 1957.

[Endorsed]: No. 15912. United States Court of Appeals for the Ninth Circuit. Continental Trading, Inc., Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Petition to Review a Decision of The Tax Court of the United States.

Filed: March 4, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15912

CONTINENTAL TRADING, INC.,
Petitioner on Review,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent on Review.

DESIGNATION OF PARTS OF RECORD TO BE PRINTED

Comes now the petitioner on review and through its counsel, Fred R. Tansill, hereby designates for printing under Rule 17 that portion of the record certified by the Tax Court of the United States of America as follows:

Docket Entries.

Petition (Including Statutory Notice of Deficiency).

Answer.

Stipulation of Facts with Exhibits I thru XVIII (1)(2)(3), XIX, XX (1)(2), XXI (1)(2)(3)(4)(5)(6)(7), XXII (1)(2), XXIII (1)(2), XXIV, XXV, XXVI, XXVII, XXVIII, XXIX (1)(2)(3), XXX (1)(2)(3)(4)(5) and XXXI, attached.

Supplemental Stipulation of Facts (Exhibits separately certified).

Second Supplemental Stipulation of Facts.

Official Report of Proceedings Before the Tax Court of the United States.

Petitioner's Brief.

Petitioner's Reply Brief.

Memorandum Findings of Fact and Opinion.

Decision.

Motion to Vacate Decision—Denied.

Motion for Reconsideration—Denied.

Motion for Leave to File Motion to Vacate Decision, to Reopen this Proceeding, and to take further Testimony—Denied.

Motion to Vacate Decision, to Reopen this Proceeding, and to take further Testimony with affidavit attached—Lodged.

Petition for Review.

Official Report of Proceedings Before the Tax Court of the United States dated November 27, 1957.

Designation of Contents of Record.

Statement of Points.

Respectfully,

/s/ FRED R. TANSILL,
Counsel for Petitioner.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 22, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STIPULATION

Come now the parties to this proceeding and through their respective counsel stipulate and agree that the following documents, heretofore designated by petitioner for printing as a part of the record, need not be so printed but may be considered by the Court in their original form without the necessity of reproduction in the printed record:

Document No. 8—Description: That portion of Document 8 consisting of all of the exhibits. Document No. 12—Description: Petitioner's Brief. Document No. 16 — Description: Petitioner's Reply Brief.

/s/ FRED R. TANSILL,
Counsel for Petitioner.

/s/ CHARLES K. RICE,
Assistant Attorney General,
Counsel for Respondent.

[Endorsed]: Filed April 7, 1958. Paul P. O'Brien, Clerk.

No. 15,913

United States Court of Appeals

For the Ninth Circuit

JOSE DIAS DE SOUZA,
Appellant,

vs.

BRUCE G. BARBER, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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No. 15,913

United States Court of Appeals

For the Ninth Circuit

JOSE DIAS DE SOUZA,
Appellant,

vs.

BRUCE G. BARBER, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

JURISDICTION.

This is an appeal from an order of the District Court denying a writ of habeas corpus to review deportation proceedings. Jurisdiction lay in the District Court through Title 8, U.S.C., sec. 2241. This Court has jurisdiction by virtue of section 2253 of said Title.

Appellant de Souza, an alien, was born in 1909, admitted for permanent residence in the United States in 1912, and was deported in 1930 following deportation proceedings in 1929 while he was still a minor.

De Souza re-entered the country in 1957, was served with notice, was given a hearing, and was ordered deported under the 1929 order pursuant to section 242 f

of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252 f).

The alien's appeal to the Board of Immigration Appeals was dismissed on January 7, 1958, and he was taken into custody January 8th. On January 9, 1958, his Petition for Writ of Habeas Corpus was filed, an order to show cause was issued thereon, and appellee's return and answer thereto was filed on January 14, 1958.

On February 12, 1958, the Honorable O. D. Hamlin, United States District Judge, signed and filed an order denying the petition for a writ of habeas corpus. Notice of Appeal to this Court was filed February 14, 1958.

STATUTES AND AMENDMENT TO CONSTITUTION.

8 U.S.C. sec. 1251

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

. . .

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, . . .

8 U.S.C. sec. 1101

(a) As used in this chapter—

. . .

(13) The term "entry" means any coming of an alien into the United States, from a foreign

port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purpose of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary; . . .

8 U.S.C. sec. 1252

. . .

(f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4) . . . of section 1251 (a) of this title. . . .

8 U.S.C. sec. 1252

(b) . . .

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this chapter, or of any other law or treaty, the decision of the Attorney General shall be final. . . .

8 C.F.R. sec. 242.6

Aliens deportable under section 242 (f) of the act. In the case of an alien within the purview of section 242 (f) of the act, the order to show cause shall charge him with deportability only under section 242 (f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.

8 C.F.R. sec. 242.22

Proceedings under section 242 (f) of the act—(a) *Applicable regulations.* Except as hereafter provided in this section, all the provisions of sections 242.8 to 242.21, inclusive, and section 242.23 shall apply to the case of a respondent within the purview of section 242.6.

(b) *Deportability.* In determining the deportability of an alien alleged to be within the purview of section 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i.e. whether the respondent is in fact an alien

who was previously deported . . . whether the respondent was previously deported as a member of any of the classes described in paragraph (4) . . . of section 241 (a) of the act; and whether respondent unlawfully reentered the United States.

(c) *Order.* If deportability as charged pursuant to section 242.6 is established, the special inquiry officer shall order that the respondent be deported under the previous order of deportation in accordance with section 242 (f) of the act. . . .

U.S. Constitution, Amendment 5

No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE.

This is an appeal from an order denying a writ of habeas corpus sought by the appellant alien upon his being taken into custody pursuant to an order of deportation.

Appellant's immigration record, referred to by the District Judge (R. 15) is the government's exhibit No. 1. That record discloses that appellant Jose Dias de Souza was born in Portugal on June 4, 1909. In February 1929, at the age of 19, appellant was sentenced to serve from one to 14 years in San Quentin prison on a charge of issuing a bank check with intent to defraud.

At the age of 19, appellant entered San Quentin on March 12, 1929. The record shows that two days later,

on March 14, 1929, he signed a paper before U. S. Immigration Inspector J. W. Howell stating that his age was then 19, that he was born June 4, 1909, and that he left the United States and entered the United States at Calexico, California, in February, 1926.

The exhibit contains what purports to be a transcript of a "record of investigation" conducted at San Quentin on May 14, 1929, by J. W. Howell, Examining Inspector, with F. E. Tuttle, Acting Spanish Interpreter, and R. H. Rule, Stenographer, present. The transcript is certified by R. H. Rule to be a "true and correct transcript of the record of investigation in this case." The transcript does not appear to be signed by de Souza. In said transcript of May 14, 1929, appellant de Souza again purportedly admitted a trip to Mexico in February, 1926.

The exhibit next contains a warrant of arrest dated June 7, 1929, issued by P. F. Snyder, Assistant to the Secretary of Labor. The warrant states that from evidence submitted to the said Snyder it appears that de Souza "who landed at the port of Calexico, California, on or about the 15th day of February, 1926, has been found in the United States in violation of the immigration act of February 5, 1917 for the following among other reasons:

> "That he has been sentenced subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude to-wit: issuing bank checks with intent to defraud, committed within five years after his entry."

There next appears in the exhibit a report of a hearing at San Quentin, dated October 4, 1929, conducted by J. A. Nielson, Jr. Said report consists in part of a form reading: "Said alien was informed that the purpose of said hearing was to afford him an opportunity to show cause why he should not be deported to the country whence he came, said warrant of arrest being read and each and every allegation therein contained carefully explained to him. Said alien was offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege was ..... accepted. The alien being first duly sworn the following evidence was presented: Q. What is your correct name? A. *Joseph Marcus Souza.* Q. Have you ever been known by another name? A. *No.* Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer? A. *No. I can handle this myself . . .*"

The balance of the October 4 hearing report is not in form. It continues: "Q. Do you waive your right to be represented by an attorney and are you now ready and willing to proceed with this hearing? A. Yes. Q. You are advised that Attorney W. D. Hahesy, of Tulare, California, has stated that he wished to be present at this hearing. Is it your wish that he be present at this hearing and represent you in these proceedings? A. No. He was not hired by me. I don't want his services whatsoever. Q. You waive your right to the services of Attorney Hahesy? A. Yes. . . ."

Appellant, according to the report, was then asked whether he had made a sworn statement to an immigration inspector on May 14, 1929, whether the answers given therein were true, and whether any changes were desired. De Souza purportedly admitted the truth of the statement made on May 14th.

The report continues with a statement by the Inspector that the May 14 statement is now incorporated into this record. When asked if he had any evidence to offer or reasons to give why he should not be deported, de Souza purportedly answered as follows:

> "I was working for Mr. A. C. Glass, who is in the produce business at the Terminal Market, 7th and Central, Los Angeles, and in the course of my duties I crossed the line into Mexico on numerous occasions. I never did stop over there more than an hour and a half at any time. I never lived in Mexico. All my people are here. They are taxpayers and haven't been out of the country for about 18 years. I was raised and educated here, and know no other country whatsoever. The reason I am not a citizen is because I haven't reached my majority. My two brothers are naturalized citizens."

In his summary, Nielson noted that the alien "is a male 19 years of age." He recommended deportation stating that "the charge contained in the warrant of arrest is sustained by the record."

The foregoing is the only "evidence" in the record. On December 2, 1929, P. F. Snyder, the Assistant to the Secretary of Labor, issued his deportation warrant containing the preamble: "Whereas from proofs

submitted to me after due hearing before Immigration Inspector J. A. Nielson, Jr., held at San Quentin, California, I have become satisfied that the alien Jose or Joseph Marcus Souza who landed at the port of Calexico, California on or about the 15th day of February, 1926, has been found in the United States in violation of the immigration act of February 5, 1917, to wit: . . ."

One year later, on December 2, 1930, the deportation warrant was executed. De Souza was deported at Galveston, Texas.

Appellant last entered the United States on June 29, 1957, with no visa. He was served with an order to show cause on which a hearing was had on August 22, 1957. The transcript of that hearing is included in the government's exhibit No. 1. The order to show cause reveals that appellee was proceeding under section 242 (f) of the Immigration and Nationality Act (8 U.S.C. sec. 1252 f). The Special Inquiry Officer pointed out he deemed the issues to be limited to (1) identity, (2) former deportation, and (3) unlawful reentry.

The transcript of August 22, 1957, as well as the brief on behalf of the government dated October 3, 1957, prepared by John J. Kelleher, the examining officer at the hearing, both disclose the contentions of counsel for appellant: that the government's case was based solely on the 1929 proceedings which were had in violation of appellant's right to due process; that there was no evidence except the admissions of the minor alien who was incarcerated at the time and

for whom no guardian or lawyer was appointed; that evidence should be admitted on the pivotal question of "entry" in 1926; that the Special Inquiry Officer should look into the validity of the 1929 proceedings instead of limiting the issues as he did.

The Special Inquiry Officer found appellant deportable under section 242 (f) of the Act (8 U.S.C. sec. 1252 f) on September 3, 1957. On January 3, 1958, the Board of Immigration Appeals dismissed the appeal taken on September 3, 1957. Appellant was taken into custody, and on January 9, 1958, his petition for writ of habeas corpus was filed in the southern division of the United States District Court for the northern district of California. (R. 3.) The writ was denied on February 12, 1958. (R. 15-17.) Notice of appeal to this Court was filed on February 13, 1958. (R. 18.)

SPECIFICATION OF ERRORS.

1. The District Court erred in refusing to review the 1929 deportation proceedings for fairness, for evidence to support the finding, and for error of law.

2. The District Court erred in refusing to grant the writ and discharge appellant where the deportation order was founded upon an infant's admission alone and was not based on reasonable, substantial and probative evidence as required by law.

3. The District Court erred in refusing to grant the writ and discharge appellant where the deportation order was contrary to law and based on an erro-

neous application of law, (8 U.S.C. sec. 1251 (a) (4)), and where appellant's offer of evidence was refused.

4. The District Court erred in refusing to grant the writ and discharge appellant where the reinstated 1929 deportation order under which he was herein ordered deported was obtained in violation of appellant's constitutional right to due process of law, particularly in view of the circumstances that his "hearings" were held while he was a minor, incarcerated in San Quentin, without guardian or lawyer.

SUMMARY OF ARGUMENT.

The matter of deportation of a resident alien is administrative and the Courts have no general power to review the proceedings if they were fair, if the finding of deportability was based upon evidence and if no error of law was committed. But if any one of those elements is missing, the proceedings are void and the Courts have the power and the duty to set aside the order. All three elements are missing here.

The Immigration Act specifically states that no deportation decision shall be valid unless it is based upon reasonable, substantial, and probative evidence. The only evidence of an entry within five years of the sentencing in this case is the admissions attributed to appellant purportedly obtained from him during his minority, while he was incarcerated, unprotected and unrepresented. Such "evidence" is no evidence. An infant cannot effectively admit.

In the circumstances, appellant's alleged "entry" at age 16 at the direction of his employer, did not constitute an entry within the act. At least the District Court should have remanded the matter to appellee in order to afford appellant an opportunity to present evidence of the circumstances and an opportunity to have a fair hearing on the merits.

Proceedings in deportation must meet the fundamental requirements of fairness encompassed by the due process clause of the Fifth Amendment of the Constitution. Due process was glaringly absent from the 1929 proceedings. Appellant was questioned two days after being imprisoned and again two months later. He was 19 years old at those times. Some months later when he was 20 years old another "hearing" took place in the prison. On none of those three occasions was he represented by a guardian. He did not intelligently waive his right to be represented by counsel. Legally he could not waive so fundamental a right. On the basis of purported admissions by him on those occasions, and solely on that basis, he was deported. The law does not permit an infant to admit away his rights—he is deemed incapable. There was no due process. The writ should have been granted.

ARGUMENT.

I. THE ADMINISTRATIVE PROCEEDINGS ARE SUBJECT TO COLLATERAL ATTACK.

The government is attempting to deport appellant under the 1929 order of deportation in accordance

with the provisions of section 242 (f) of the Act. The District Court was under no misapprehension on that fact. (R. 16.) Nevertheless, the Court said:

> "The petitioner would have this Court disinter his first deportation order which was issued in 1930 and examine the evidence upon which it was based; he claims it was invalidly issued. I do not believe I am permitted to do that. United States ex rel. Steffner v. Carmichael, (5 Cir., 1950) 183 F. 2d 19. . . ."

Appellant does urge most strongly that those prior proceedings be examined. There is a basic infirmity in those proceedings which the District Court should have recognized as a command to discharge the appellant. Incidentally, it is not the appelant who would have the Court "disinter" the prior order—the government has based its present order upon those prior proceedings:

> ". . . such alien shall be deported under such previous order . . ." (8 U.S.C. sec. 1252 f; R. 16).

The erroneous reasoning of the Court, disclosed in its Order (R. 15-17), is that once there have been prior proceedings resulting in an order of deportation, that order of deportation is inviolate, those proceedings unimpeachable. Such is the fundamental error in this case.

A clear statement of the true rule appears in *U.S. ex rel. Schlimmgen v. Jordan,* 164 F. 2d 633, 634:

> "Courts may not interfere with administrative determinations unless, upon the record, the proceedings were manifestly unfair, or substantial

> evidence to support the administrative finding is lacking, or error of law has been committed, or the evidence reflects manifest abuse of discretion . . ."

The rule, quite naturally, is approved by the Supreme Court. (*Low Wah Suey v. Backus,* 225 U.S. 460, 32 S.Ct. 734, 56 L.Ed. 1165; *Kessler v. Strecker,* 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082.)

What was overlooked by the District Court is the all-important clause following the word "unless." Even in the *Steffner* case cited by the Court, the qualification was recognized. The Circuit Court there said (183 F.2d 19, 20):

> "Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding *unless we are convinced that there was a gross miscarriage of justice in the former proceedings. . . .*" (Stress added.)

In that case, the Court pointed out that the alien had his day before the immigration authorities. In the case here on appeal, it appears that appellant never had his day before the immigration authorities.

What the Court meant by the words "gross miscarriage of justice" cannot be known. But what is required to set aside the administrative proceedings has been clearly spelled out by the Supreme Court in *Kessler v. Strecker,* supra, 307 U.S. 22, 34:

> ". . . The proceeding for deportation is administrative. If the hearing was fair, if there was

> evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If on the other hand one of the elements mentioned is lacking, the proceeding is void and must be set aside . . .''

There must, above all, be a fair hearing. There must be evidence to support the finding of deportability. There must be no error of law.

A moment's thought on the matter shows that the rule is sound. Congress has control of deportation, and the executive branch of government must enforce the laws, but in a non-exclusion case, at least, the alien is entitled to the protection of the Court as to matters of fundamental fairness (as distinguished from weighing the evidence or determining the facts *de novo*). In *Whitfield v. Hanges,* 222 F. 745, 751, the Court recognized that upon contradictory evidence the administrative body may not be reversed by the Courts, but the question of whether or not there is any substantial evidence to support the finding is one of law ''the power and duty to determine which are vested in the Courts, and any injurious error in deciding that question by any executive or quasi judicial officer or tribunal is reviewable and remediable by them. Administrative orders and findings quasi judicial in character are void if the finding is contrary to the 'indisputable character of the evidence.' . . .''

The bases for collateral attack appear to be clear. If one or more exist, the time lapse should present no problem. Since the prior proceedings are now

being presented as the basis for deportation, the government cannot complain if a court for the first time tests the fairness of those proceedings. So long as grounds exist in fact upon which a collateral attack is permitted, the proceedings must be set aside. The passage of time, alone, has never deterred the Courts. In *U.S. ex rel. Rubio v. Jordan,* 190 F.2d 573, 575-576, the Court recognized the rule that collateral attacks are not permitted unless the Court is convinced of a gross miscarriage of justice. The Court concluded:

> "Here we find no such gross miscarriage of justice in the former deportation proceedings as would justify our review of those proceedings. At each step the petitioner was represented by counsel . . ."

In that case several years elapsed between the prior and later proceedings, but that was not a cause for refusal to review.

In *Pennsylvania ex rel. Herman v. Claudy,* 350 U.S. 116, 76 S.Ct. 223, 100 L.Ed. 126, eight years elapsed. In *Mooney v. Holohan,* 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, eighteen years elapsed. Those were criminal cases, to be sure, but an alien is subject to as great a loss as the criminal. Deportation may deprive a man "of all that makes life worth living." (*Ng Fung Ho v. White,* 259 U.S. 276, 284, 42 S.Ct. 492, 495, 66 L.Ed. 938.) "Deportation is a drastic measure and at times the equivalent of banishment or exile." (*Fong Haw Tan,* 333 U.S. 6, 10, 68 S.Ct. 374, 376, 92 L.Ed. 433.)

In *Bridges v. Wixon,* 326 U.S. 135, 154, 65 S.Ct. 1443, 1452, 89 L.Ed. 2103, the Court said:

> ". . . We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness."

At the administrative level likewise the lapse of time alone is not a deterrent. A discussion of several cases can be found in *In the Matter of S..... In Deportation Proceedings,* 3 I. & N. 83.* At page 85, *In Matter of F.....* is discussed where a 1931 deportation was reviewed in 1944. The former proceedings were determined, at the later hearing, to have been erroneous as a matter of law. At page 86, *In Matter of F.....* is discussed. There, the former proceedings took place in 1920 and the present inquiry in 1947. The earlier proceedings were set aside as incorrect as a matter of law. *In Matter of S..... Q.....*, is cited and quoted at page 86. There the former proceedings took place in 1929. Eighteen years later the Board of Immigration Appeals held:

> "The findings of deportability made upon the basis of the 1929 deportation hearing are not, of

*The full title of volume is: Administrative Decisions Under Immigration & Nationality Laws.

> course, binding upon us in this proceeding. We are free to examine the 1928 hearing record to ascertain whether or not the alien's prior deportation was lawful. If there was no evidence to support the warrant charges, or if there was an erroneous application of law, the prior determination of deportability may be set aside.
>
> In finding the alien subject to deportation as a prostitute in 1928, the immigration authorities improperly applied the rule of law set forth in the Mittler case . . . On the basis of the Daskaloff case, we must set aside the 1928 deportation."

The latter case referred to is *Daskaloff v. Zurbrick,* 103 F.2d 579. That case stated that no collateral attack was available, but the Court nevertheless looked into the prior proceedings and found (1) the alien was awarded a full and fair hearing (2) there was evidence upon which the order could have been predicated, and (3) there was no erroneous application of law. Beyond these inquiries, of course, as the Supreme Court has stated, the Courts have no power. But it is exactly these inquiries that the District Court should have made in the instant case. Appellant in the instant case has not had a fair hearing, there was no evidence of entry in 1926, and the determination that an entry had taken place was based upon an erroneous rule of law.

We shall burden this Court with one final quotation from the Administrative Decisions (3 I. & N. 83, 86), because the language of the Board of Immigration Appeals is particularly appropriate. At page 86, *In*

Matter of M..... appears. The alien had previously been deported in 1940 on the ground that he had been convicted of a turpitude crime within five years of entry. Prior to his deportation, *U.S. ex rel. Guarino v. Uhl,* 107 F.2d 399, came down holding that mere possession of burglary tools (of which crime the alien had been found guilty) was not an offense involving moral turpitude. The Board of Immigration Appeals is quoted:

> "When the respondent was deported in April 1940, the *Guarino* case, *supra,* had been decided and that decision was considered the law. Accordingly, his deportation at that time on a charge considered then to be invalid was clearly erroneous. To sustain the present deportation charges, based on the act of March 4, 1920, as amended, would be only continuing this error. There is no reason why this Board cannot take steps in these proceedings to correct a past error. Such action, we feel, is not contrary to the well-established principle that judicial decrees or judgments may not be collaterally attacked. In this way, substantial justice will be accomplished, and more especially so under the circumstances of this case where the alien is already in the United States and his deportation is sought on a ground based on a past mistake. We shall, therefore, not sustain those charges."

In the instant case, the 1929 proceedings were manifestly unfair; there was no substantial evidence, or, indeed, any evidence to support the finding; and error of law was committed. In such circumstances, the Board of Immigration Appeals stated that substantial

justice would require the correction of the past mistake, and such action would be a valid collateral attack. We asked the District Court to correct the past mistake in the instant case. We ask this Court to do equal justice.

II. THE DEPORTATION FINDING WAS NOT SUPPORTED BY VALID EVIDENCE.

Appellant was deported in 1930 upon the ground that he had been sentenced to a term of more than one year in prison for a crime involving moral turpitude within five years of entry. To support the order of deportation the government had to prove the sentence and the entry. The only evidence of the entry is the purported admission of appellant immediately after he was imprisoned in San Quentin, during his minority.

Due process to one side, the admissions of an infant cannot be used against him, and certainly cannot satisfy the requirements of the act, viz.:

> "No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." (8 U.S.C. sec. 1252 (b) (4).)

The purported admissions of appellant should be considered a nullity and stricken from the record. Story, *Equity Pleading,* sec. 871 speaking of infants states:

> ". . . He is considered as incapable of entering into the unlawful combination; and his answer cannot be excepted to for insufficiency; *nor can*

any admission made by him be binding." (Stress added.)

The Supreme Court quoted the above statement in *White v. Miller,* 158 U.S. 128, 146, 15 S.Ct. 788, 39 L.Ed. 921. Also in that case, the Court had the following to say (p. 146):

> "In *Wright v. Miller,* 1 Sandf.Ch. 109, it was held that the answer of an infant defendant by his guardian ad litem is not binding upon him, and no decree can be made on its admission of facts. Where relief is sought against infants, the facts upon which it is founded must be proved; they cannot be taken by admission; and *Wrottsley v. Bendish,* 3 P.Wms. 236, was cited to that effect.
>
> "Where there are infant defendants, and it is necessary in order to entitle the complainant to the relief he prays, that certain facts should be before the court, such facts, although they might be the subject of admissions on the part of adults, must be proved against the infant.' 1 Daniel's C.P. 238; *Mills v. Dennis,* 3 John.Ch. 367."

In *Bank of U. S. v. Ritchie,* 33 U.S. 128, 8 L.Ed. 890, a judgment was obtained against minors concerning property. A guardian ad litem had been appointed upon the motion of plaintiff's counsel without notice to the infants. The guardian answered and admitted liability for the infant. At page 145 the Supreme Court held:

> "The court could not have acted on this admission. The infants were incapable of making it, and the acknowledgment of the guardian, not on

> oath, was totally insufficient. The court ought to have required satisfactory proof of the justice of the claims, and to have established such as were just before proceeding to sell the real estate."

On the above authorities it is clear that the government should not be permitted to act upon the admissions appearing in the record. This is not a case where the evidence is merely insufficient to meet the standards of the act like *Mouratis v. Nagle,* 24 F.2d 799 and *Ex Parte Fierstein,* 41 F.2d 53, where this Court reversed the orders of the District Court denying the writ. The question here is not whether there is enough evidence to warrant deportation. The question is whether there is any evidence at all cognizable by law.

Wholly aside from the fact that the hearings in 1929 violated appellant's right to due process, it is here argued that the only evidence of a 1926 entry consists of the record entries wherein a minor, newly imprisoned, admittedly without lawyer or guardian, is supposed to have admitted the fact. Since those admissions cannot bind the minor, there is no evidence in the record.

III. NO ENTRY WAS PROVED; THE FINDING THEREON BEING BASED ON AN ERRONEOUS APPLICATION OF LAW.

In 8 U.S.C. sec. 1101 (a) (13) Congress has stated:

> ". . . an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for

> the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary . . ."

Assuming for the purposes of this argument the facts stated in the government's exhibit (Report of Hearing conducted by Inspector J. A. Nielson, Jr., at San Quentin October 4, 1929; and Statement taken at San Quentin May 14, 1929) that at the age of 16 appellant went to Mexico in the course of his employment and remained for no more than an hour and a half, it is respectfully submitted not only that such statements are not valid evidence, but also that the departure was not intended, or reasonably to be expected by appellant, or voluntary.

Throughout this proceeding, counsel for appellant has offered to prove those contentions, but their offer was not accepted. (See transcript of August 22, 1957 hearing in the exhibit.)

Where a boy of 16 is sent by his employer to make delivery of produce in Mexico, and where such trip requires only an hour and a half at most, his return cannot be deemed to be an entry within the requirements of the statute. His departure was not expected, intended or voluntary.

In *Valenti v. Karnuth,* 1 F.Supp. 370, 373, the voluntary aspect of a minor's conduct was examined. The Court said:

> "A schoolboy of 16, in an American public school, told with the others of his class that the class would go across Lake Erie to a Canadian beach for a day's picnic, and who goes with the teacher and class and returns with them, is not possessed of freedom of action to decide whether or not he will go. *He is not a free agent acting entirely of his own volition . . .*" (Stress added.)

Appellant, at the age of 16, sent by his employer in the course of his occupation into Mexico, is likewise not a free agent. He is no more competent to exercise his own volition than is a schoolboy under the supervision of his teacher.

To say that such a trip across the border and back constitutes an entry that is voluntary, reasonably to be expected, and intended by a boy of 16 is to give a "capricious application" to the law in the words of the Supreme Court in *Delgadillo v. Carmichael,* 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. In that case the alien having shipped on a U. S. merchant ship during the war was taken to Cuba when his ship was torpedoed after it had passed through the Panama Canal. He returned to the United States after remaining one week in Cuba for treatment. Thereafter, within five years, he was convicted of robbery, and deportation proceedings were had. The Supreme Court held that there was no entry since he was forced to enter the foreign port, he did not select it.

In the foregoing case the Supreme Court distinguished *U.S. ex rel. Clausson v. Day,* 279 U.S. 398, 49 S.Ct. 354, 73 L.Ed. 758; *U.S. ex rel. Stapf v. Corsi,*

287 U.S. 129, 53 S.Ct. 40, 77 L.Ed. 215; and *U.S. ex rel. Volpe v. Smith,* 289 U.S. 422, 53 S.Ct. 665, 77 L.Ed. 1298, as cases where the alien plainly expected or planned to enter a foreign place. The Court also cited *DiPasquale v. Karnuth,* 158 F.2d 878, where an adult alien aboard a sleeping car passed through Canada and back into the United States. Such entry into the country was not one within the meaning of the law. A similar case is *Wong Yuen v. Prentis,* 234 F. 28, where a Chinese alien rode into Canada and back again in a freight car. There was no entry.

The law of this Circuit at the time of appellant's alleged entry was established by *Ex parte T. Nagata,* 11 F.2d 178, decided in February, 1926. In that case an alien seaman left the United States and went fishing in Mexican waters. His return constituted no entry within the meaning of the act. The Court said (p. 179):

> ". . . If an alien who has acquired the right to reside in the United States must forfeit that right when, in the course of his ordinary business, as a seaman on a domestic vessel, he is carried into foreign waters, the result is harsh indeed, and is one which I do not believe was intended by any provision of the immigration law."

Even in the case of adults it is seen that the mere physical return to this country is not necessarily an "entry" within the meaning of the immigration law. Another 9th Circuit case in effect during the period in question is *Weedin v. Banzo Okada,* 2 F.2d 321.

There an alien seaman went ashore for a few hours in Australia. This was held not to change his status.

Brevity of the stop-over in the foreign place is not alone the determining factor. We are not unaware of the leading cases from the Supreme Court, *Lapina v. Williams,* 232 U.S. 78, 34 S.Ct. 196, 58 L.Ed. 515, and *Lewis v. Frick,* 233 U.S. 291, 34 S.Ct. 488, 58 L.Ed. 967, often cited for the proposition that the length of time out of the country does not aid the alien. In both of those cases, however, the entry itself was tainted. In the first, the alien was a prostitute practicing in this country before she left and intending to continue upon her return. Her entry, therefore, was colored by the fact that she was an undesirable in the eyes of Congress. In the second, the alien went to Mexico in order to bring back a woman for purposes of prostitution. In the case on appeal, the only office of the alleged entry was to serve as a point of departure from which the five year period could be measured. In and of itself appellant's "entry" was not prohibited or tainted. Therefore, even if an adult were involved, the above cases would not control. We are here dealing with a boy 16 years old, told by his employer to deliver goods across the border. The boy did not voluntarily leave. He was not a free agent. He was an alien with a lawful residence in this country. He should not be held to have forfeited his right to remain in this country because of the involuntary trip. Had he been engaged in some criminal activity in crossing the border, he would have come within the proscription of Congress.

It is respectfully submitted that there has been an erroneous application of law in the determination that appellant made an entry in 1926.

IV. APPELLANT'S CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW WAS VIOLATED.

An alien, being a "person" has the same right to protection under the due process clause of the Fifth Amendment as a citizen. *(Galvan v. Press,* 347 U.S. 522, 530, 74 S.Ct. 737, 98 L.Ed. 911.) While it is true that Congress has the policy-making power over aliens and the executive branch of government must enforce the policies established, the procedural safeguards of due process must be respected. (Japanese Immigrant Case: *Yamataya v. Fisher,* 189 U.S. 86, 101, 23 S.Ct. 611, 47 L.Ed. 721; *Wong Yang Sung v. McGrath,* 339 U.S. 33, 49, 70 S.Ct. 445, 94 L.Ed. 616.)

Appellant here contends that the record before the District Court consisting of the government's exhibit reflects an absence of due process in the 1929 hearings and proceedings.

We respectfully ask this Court to consider the following *combination* of circumstances:

1. A 19 year old boy is imprisoned in a state penitentiary with the concomitant lack of freedom to seek friends or other aid.

2. Within 2 days, he is asked to sign a statement before immigration authorities containing a pivotal "admission."

3. Two months later, he is subjected to another hearing while still only 19. The same admission is purportedly obtained.

4. A few months later another hearing is held —he is a little over 20 years old.

5. At none of the hearings is he represented by friend or guardian.

6. At none is he represented by a lawyer.

7. He is incompetent as a matter of law.

8. He is incompetent in fact. ("I can handle this myself."!)

9. The government produced no evidence.

10. The only evidence in the record is the incompetent "admission" of the infant.

We do not here argue that this is a Sixth Amendment case. While we have shown that this is as serious a matter to appellant as would be a criminal appeal, we do not urge that he had an absolute right to counsel in the immigration proceedings in 1929 for that reason.

We do not here argue that the proceedings lacked the requisite fairness of due process solely because appellant was imprisoned at the time.

We do, however, earnestly assert that they are factors to be considered with the other circumstances in determining whether the fundamentals of fairness were present. How was the alien of 19 protected by due process when he was questioned two days after

being imprisoned in San Quentin? In *Whitfield v. Hanges,* 222 F. 745, 749, the Court said:

> "Indispensable requisites of a fair hearing according to these fundamental principles are that the course of proceeding shall be appropriate to the case *and just to the party affected;* that the accused shall be notified of the nature of the charge against him *in time to meet it;* that he shall have such an opportunity to be heard that he may, if he chooses, cross-examine the witnesses against him; that he may have time and opportunity after all the evidence against him is produced and known to him to produce evidence and witnesses to refute it; that the decision *shall be governed by and based upon the evidence at the hearing, and that only;* and that the decision shall not be without substantial evidence taken at the hearing to support it . . . That is not a fair hearing in which the inspector chooses or controls the witnesses, or prevents the accused from procuring the witnesses or evidence *or counsel he desires . . .*" (Stress added.)

In *Gilles v. Del Guercio,* 150 F.Supp. 864, 867, absence of counsel coupled with improper evidence amounted to absence of due process. In *U.S. ex rel. Castro-Louzan v. Zimmerman,* 94 F.Supp. 22, the failure to provide counsel was not the sole cause but was an important reason for the Court deciding that a fair hearing had been denied.

In *Hyun v. Landon,* 219 F.2d 404, 406, this Court recently stated:

> "An alien in deportation proceedings must be afforded due process of law, including a fair

> hearing, . . . and indispensable to a fair hearing are reasonable notice, the right to examine witnesses and to testify and to present witnesses *and to be represented by counsel* . . ." (Stress added.)

See also from this circuit *Roux v. Commissioner,* 203 F. 413.

The bright light of due process begins to fade when the foregoing cases are opened to admit an imprisoned infant upon the scene.

The law has been careful to watch over infants. In California, by law, (Cal. Code of Civil Procedure, secs. 372, 373) where a minor is a party to an action or proceeding he must appear either by a general guardian or guardian ad litem. The Federal Rules of Civil Procedure, Rule 17 (c), likewise provide for the appointment of a guardian ad litem where the minor is not otherwise represented.

Legally, appellant was in need of protection. "A minor is presumed to be incapable of exercising a sound discretion over his affairs." (*DeLevillain v. Evans,* 39 Cal. 120.) Lest there be any doubt, factually, that he was incompetent to manage his affairs, listen to the ring of his words:

> "I can handle this myself."

Those were his words in answer to the question put to him at the October 4, 1929 hearing concerning the services of a lawyer. It matters not whether they were the words of a brash youngster, an inmate hardened by seven months of prison life, or a scared youth with false bravado. In any event, in the eyes of the law,

he was deserving of its protection. His words were a nullity. He was incapable of waiving his rights. Not only was there no "intelligent" waiver by the test of *Johnson v. Zerbst,* 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461, there was *no* waiver.

> "It has been said that a minor can waive nothing, cannot consent, and nothing can be construed against him."
>
> (*Bartels Estate,* (Calif.) Myrick's Prob.Rep. 30.)

> "Courts do not permit his rights to be prejudiced by an act of his own, or of any other person."
>
> (*Johnston v. So.Pac.,* 150 Cal. 535, 89 P. 348.)

The fading light of due process has grown dim indeed. If one more factor is needed to extinguish it completely it is to be found in the illusory "admission" that constitutes the sole evidence against appellant on the vital element of entry.

In *U.S. ex rel. Shaw v. Van de Mark,* 3 F.Supp. 101, the Court held the proceedings to be unfair where the deportation order was based upon testimony of the alien at a time when she was insane and without counsel. No one could disagree with such a ruling. Is the case at bar any different?

In *Bridges v. Wixon,* supra, 326 U.S. 135, 156, 65 S.Ct. 1443, 89 L.Ed. 2103, there was more than merely the one piece of contaminated evidence. The Supreme Court said that unfairness would not be shown by proof that the decision was wrong or that incompe-

tent evidence was admitted and considered. The Court continued:

> "... But the case is different where evidence was improperly received, and where but for that evidence it is wholly speculative whether the requisite finding would have been made. Then there is deportation without a fair hearing which may be corrected on habeas corpus ..."

Without the record admission of appellant, it is not "speculative" as to whether the finding could be made —it is absolutely impossible.

CONCLUSION.

We sincerely believe that the record presented to the District Court exposed the gross unfairness of the proceedings upon which appellant's deportation has been ordered. The unfairness is such as should be remediable by habeas corpus. The District Court erred in refusing to examine the record and to grant the writ.

We can think of no simpler way of expressing our prayer than to quote the words of the Supreme Court in *Bridges v. Wixon,* 326 U.S. 135, 154, 65 S.Ct. 1443, 89 L.Ed. 2103:

> "... We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That

deportation is a penalty—at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness.''

Dated, San Francisco, California,
May 12, 1958.

Respectfully submitted,
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Attorneys for Appellant.

GUERNSEY CARSON,
Of Counsel.

No. 15,913

United States Court of Appeals

For the Ninth Circuit

JOSE DIAS DE SOUZA,
Appellant,

vs.

BRUCE G. BARBER, Director of Immigration and Naturalization,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

STATEMENT OF FACTS.

In its reply brief (page 8), appellee has found it expedient to reprint several irrelevant facts whose sole function seems to be to paint a generally bad picture of appellant. That appellant may have been married twice, may have had two illegitimate children, may have been a defendant in a "paternity action", and may, as a youth, have served a four-month sentence in a reformatory, can have no real bearing on the issues before this Court.

Again, at page 11, the government finds it expedient to mention several entries of appellant prior to the June, 1957, entry relied upon in the deportation proceedings.

The facts are uncomplicated: Deportation proceedings against appellant were instituted in 1929 when he was imprisoned at San Quentin while a minor without guardian or counsel. He was ordered deported because he had been sentenced for a turpitude crime within 5 years of entry to the United States. The government did not prove the entry by producing witnesses, depositions or other evidence. That prerequisite was supplied by the exaction from appellant of a statement that at age 16 he had gone into Mexico at the direction of his employer in the course of his employment to deliver produce. In 1930 appellant was deported. In June, 1957, he re-entered the country. The government instituted deportation proceedings under section 242f of the Immigration & Nationality Act of 1952 (8 U.S.C.A., sec 1252f). Appellant was found to have unlawfully re-entered the United States, and by the terms of said section of the Act, the prior order was deemed to have been reinstated and appellant had to be ordered deported under that prior order. On habeas corpus, the District Court refused to exmaine the record of the prior administrative proceedings although the law required the present deportation to be based thereon and although said record was lodged with the District Court by the government.

QUESTIONS PRESENTED.

At page 10 of its brief the government poses three questions. The first of these is not clear: Was "respondent" required to entertain a collateral attack upon the prior proceedings? Does this mean: Was the

administrative officer or board required to examine the prior proceedings for fairness? If so, appellant has cited authority for such action at pages 17-20 of his opening brief. Does the question mean: Should the government be put to the trouble of listening to appellant? The question is not clear. In any event, appellant's fundamental right to due process has been violated, and he sincerely seeks the aid of this Court to strike the void order from the record and require the government to proceed with due regard for appellant's constitutional rights.

In answer to the second question, the Court below should have reviewed the 1929 order, for (1) such order was legally before it since section 242f of the Act required that any deportation be based upon the prior order, and (2) such order and the record of proceedings leading to that order were actually and physically before the Court as an exhibit.

In answer to the third question, if the prior proceedings are reviewed it is submitted that this Court will find a lack of due process, an absence of a fair hearing, and other infirmities.

ARGUMENT.

I. THE ADMINISTRATIVE PROCEEDINGS ARE SUBJECT TO COLLATERAL ATTACK.

Appellee's main argument (pages 10-18 of its brief) seems to be that the 1929 proceedings could not have been reviewed by the District Court and cannot be examined by this Court. At page 12 appellee cites

an annotation to *U.S. ex. rel. Knauff v. Shaughnessy,* 94 L.Ed. 317, 332. At page 334 of the annotation, the following language appears:

> "It is to be observed that, despite statutory provision that administrative decisions in deportations are to be final, such decisions may be collaterally reviewed by the courts by habeas corpus. United States ex. rel. Bilokumsky v. Tod (1923), 263 U.S. 149, 68 L.ed. 221, 44 S.Ct. 54; United States ex. rel. Vajtauer v. Commissioner of Immigration (1927), 273 U.S. 103, 71 L.ed. 560, 47 S. Ct. 302; Bridges v. Wixon (1945), 326 U.S. 135, 89 L.ed. 2103, 65 S.Ct. 1443 . . ."

It seems clear that where, as here, the government elects to base its present deportation order upon a prior deportation order, and where, as here, the alien is entitled to due process of law, that prior deportation order may be brought before the Courts to be tested for due process. If this were not so, the prior order would stand inviolate, no matter what its origin. If the government's argument is accepted it is conceivable that a person could be deported upon the fiat of any administrative tyrant without notice or hearing, and upon re-entry be re-deported under section 242f of the Immigration & Nationality Act of 1952 (8 U.S.C.A. sec. 1252f) with no power to disclose the basic defect of the prior order.

Such is not the law. If the alien is entitled to due process (and he is: *Galvan v. Press,* 347 U.S. 522, 530, 74 S. Ct. 737, 98 L.Ed. 911), he must have access to the Courts to enforce his right. (*Kessler v. Strecker,* 307 U.S. 22, 34, 59 S.Ct. 694, 83 L.Ed. 1082.) True,

the administrative order is final in the sense that it may not be reviewed judicially for error, a judicial trial *de novo* may not be had, nor is there a judicial appeal. The Courts, nevertheless, are available to preserve the constitutional right to due process of law. As the Supreme Court said in *Kessler v. Strecker, supra,* 307 U.S. 22, 34:

> ". . . The proceeding for deportation is administrative. If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If on the other hand one of the elements mentioned is lacking, the proceeding is void and must be set aside . . ."

At page 15 of its brief the government charges that appellant "seeks to reopen the 1929 proceedings." Citing and discussing *U.S. ex rel. Blankenstein v. Shaughnessy,* 112 F. Supp. 607, (appellee's brief, pp. 13-14), the government points out that it was not bound to proceed under section 242f of the Act. The fact is, however, that the government did proceed under that section. By so doing, the government has brought before the Court the 1929 order—its present deportation order is, and must be, based upon the prior order. It cannot now prevent the Court from testing the prior order for due process.

Under subdivision (1), page 16 of its brief, the government argues that the terms of section 242f of the Act precludes review by this Court. We do not find any such proscription in the section; and if it

were there, it would be unconstitutional as contrary to the 5th amendment of the U.S. Constitution. (*Kessler v. Strecker,* 307 U.S. 22, 59 S.Ct. 694, 83 L.Ed. 1082; *Yamataya v. Fisher,* 189 U.S. 86, 23 S.Ct. 611, 47 L. Ed. 721.) In point are the very cases discussed and cited by appellee in its brief, pages 16-18.

In *U.S. ex. rel. Steffner v. Carmichael,* 183 F.2d 19, the alien was deported in 1933 in accordance with an interpretation of the law then existing. Later, in 1939, the Supreme Court handed down a contrary interpretation. The alien contended that he, therefore, had been illegally deported. The Court held that a change in the interpretation of law could not be accepted as the basis of reopening the case. But the Court did recognize its power to protect the alien's constitutional right to due process, as seen in the following excerpts from the case:

> ". . . we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding, unless we are convinced that there was a gross miscarriage of justice in the former proceedings . . ." (p. 20.)
>
> . . . He had his day before the immigration authorities . . ." (pp. 20-21.)
>
> ". . . There is no showing that his failure to test the validity of this order was due to any cause other than his desire not to do so . . ." (p. 20.)

In the case here on appeal, there was a gross miscarriage of justice in the 1929 proceedings in spite of the *ipse dixit* to the contrary of appellee's counsel

at page 18 of its brief. The government took unseemly advantage of the imprisoned youth. Failing to cloak him decently with guardian or counsel, and failing to prove its case by witness or deposition, it exacted admissions of a crossing of the border by the appellant at age 16 under direction of his employer, and thereon based its deportation order.

Unlike the *Steffner* case, the appellant here has never truly "had his day before the immigration authorities." Further, the presence of counsel in the proceedings would probably have assured appellant of a test of the validity of the order at the time.

In *U.S. ex rel. Rubio v. Jordan,* 190 F.2d 573, cited at page 18 of the brief, the Court recognized that a gross miscarriage of justice is a basis for judicial review of the administrative proceedings. The Court concluded (pp. 575-576):

> "Here we find no such gross miscarriage of justice in the former deportation proceedings as would justify our review of those proceedings. At each step the petitioner was represented by counsel. . . ."

In *U.S. ex. rel. Beck v. Neely,* 202 F.2d 221, 223, also cited by appellee, the Court expressly recognized its power to examine the administrative proceedings for fairness in spite of a statute making the decision of the Attorney General final. The Court cited *U.S. ex. rel. Schlimmgen v. Jordan,* 164 F.2d 633, 634, where it was said:

> "Courts may not interfere with administrative determinations unless, upon the record, the pro-

ceedings are manifestly unfair, or substantial evidence to support the administrative finding is lacking, or error of law has been committed, or the evidence reflects manifest abuse of discretion . . ."

The *Beck* case also cited *Daskaloff v. Zurbrick,* 103 F.2d 579, 581, the last of appellee's cases in this section of its brief. In the *Daskaloff* case the Court examined the administrative proceedings to determine whether (1) there had been a fair hearing, (2) there was evidence upon which the order could have been predicated, and (3) there was no erroneous application of law.

In the case on appeal, the District Court erred in refusing to look at the record of the administrative proceedings in 1929. That record demonstrates its own fundamental defects.

II. EXAMINATION BY THE COURT OF THE PRIOR ADMINISTRATIVE PROCEEDINGS SHOULD INDEED CONSIST OF A REVIEW IN ACCORDANCE WITH THE ESTABLISHED PRINCIPLES.

At page 19 of its brief appellee indicates by its caption that it agrees with appellant. This section of its brief consists of three sub-headings entitled: (a) Due Process, (b) Fair Hearing, and (c) Evidence Must Support the Deportation Order. Authorities are cited under each sub-heading, and appellant cannot quarrel with the implications. The purpose of this appeal is to have a judicial review of the prior proceedings to

disclose the inherent defects therein consisting of lack of due process, absence of a fair hearing, and nonexistence of evidence to support the deportation order of 1929.

The balance of this section of the government's brief consists of two sentences and a list of cases. In the first sentence it is stated that the requirement of reasonable, substantial and probative evidence was added by the 1952 Act, sec. 242(b), 8 U.S.C. 1252(b). It may be that no prior statute has set forth the foregoing requirements, but the case law has long ago established that substantial evidence taken at the hearing is required. (*Whitfield v. Hanges,* 222 F. 745, 749.) Appellee infers that something less than or different from "reasonable", "substantial", or "probative" evidence would suffice prior to 1952, but no suggestion is tendered as to what standard should satisfy this Court. It is submitted that even in 1929 fairness demanded reasonable, substantial and probative evidence.

The second sentence of this section of appellee's brief purports to dispose of the case by asserting that appellant was afforded due process and a fair hearing, and that the evidence not only supported the findings but was reasonable, substantial and probative. We believe that we have adequately presented our case in the opening brief and hence will not reiterate our arguments. There remains only a duty to discuss the cases cited by the government.

The first case cited is *Del Guercio v. Delgadillo,* 159 F.2d 130. That case was reversed by the Supreme

Court *sub nomine Delgadillo v. Carmichael,* 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. The case turned on the question of entry. The alien, a seaman, was shipwrecked and taken to a foreign port during wartime. He returned within a week. The Supreme Court held that there was no entry within the meaning of the Act. That there was a fair hearing in that case, and that there was an intelligent waiver of right to counsel in that case, do not militate against appellant in the instant case.

We have heretofore discussed *U.S. ex rel. Steffner v. Carmichael,* 183 F.2d 19, and *U.S. ex rel. Beck v. Neely,* 202 F.2d 221, next cited by appellee. In neither case were there any circumstances similar to those surrounding the 1929 proceedings concerning appellant herein.

The same can be said as to the final two cases cited by appellee. In *DeBernardo v. Rogers,* 254 F.2d 81, the alien entered this country in 1912. He committed one crime in 1927 and another in 1932, for both of which he was sentenced to more than one year. In 1932 he was ordered deported under the Immigration Act of 1917, sec. 19, in that he had been sentenced to imprisonment more than once for a term of more than one year for crimes involving moral turpitude. He was not deported, the government having decided to wait until his release from prison. In 1952, the deportation order was vacated, and administrative hearings were begun to determine whether one of the crimes for which he had been sentenced in fact involved moral turpitude. The alien was not represented by counsel

and was indigent and unable to engage counsel. The administrative hearings proceeded with the alien being unrepresented. He later brought suit for declaratory relief in which suit he was represented by counsel. He was found to be deportable. The Court of Appeal expressly refrained from deciding whether failure to provide counsel at the administrative level violated due process inasmuch as the alien was represented in the court proceedings, and in the administrative hearings the facts on which his deportation was ordered were not in issue.

The final case cited by appellee in this section of its brief (p. 20) is *Bisaillon v. Hogan* (9th Cir.), No. 15,749, decided by this Court in July of this year. In that case the alien contended that deportation proceedings were invalid because, among other reasons, she was not represented by counsel. This Court pointed out, however, that she was not indigent, that she was given opportunity to engage counsel but did not do so at the lower administrative level, that in fact she was represented by counsel before the Board of Immigration Appeals and before the Court. The case is not similar to the case on appeal except for the circumstance that the first hearing was held in prison.

Beyond the mere statement of the government that appellant was afforded due process and a fair hearing, and that there was substantial, reasonable and probative evidence to support the findings, there is nothing presented by the government to establish those elements.

In the opening brief we pointed out that the government did not *prove* an entry but that it rested on purported admissions exacted from the minor in prison without the protection of guardian or counsel. Ample authority was cited to demonstrate that such evidence is no evidence, and that such proceedings lacked the basic fairness required by the due process clause. The government has not attempted to refute the arguments, nor has it offered any authority to the contrary.

III. THE FINDING AS TO ENTRY WAS BASED UPON AN ERRONEOUS APPLICATION OF LAW.

As earlier argued, the government did not prove an entry by appellant. No evidence was offered except the debile "admissions" of appellant exacted in such circumstances as to demonstrate their incompetence. In addition, appellant has argued (opening brief, pp. 22-27) that, even assuming the facts to be as purportedly admitted, there was no entry within the meaning of the Act.

Congress has stated that there is no such entry if the departure from this country was not intended, was not reasonably to be expected, or was not voluntary. (8 U.S.C. sec. 1101 (a) (13).) In this connection, the quotation from *Carmichael v. Delaney,* 170 F.2d 239, 242, appearing at page 22 of appellee's brief, is directly in accordance with appellant's position: Not every physical entry constitutes an entry within the meaning of the law.

Contrary to the implication from the quotation from *Matsutaka v. Carr,* 47 F.2d 601, appearing on the same page of the government's brief, the *Carmichael* case was concerned with the fact of entry as well as with the right. In the first part of the case, the Court expressly held that in the circumstances of the case there was no entry. In the latter part of the case the Court discussed the right to enter and have a judicial trial.

Appellee also refers to *U.S. ex rel. Claussen v. Day,* 279 U.S. 398, 49 S.Ct. 354, 73 L.Ed. 758; *U.S. ex rel. Stapf v. Corsi,* 287 U.S. 129, 53 S.Ct. 40, 77 L.Ed. 215, and *U.S. ex rel. Volpe v. Smith,* 289 U.S. 422, 53 S.Ct. 665, 77 L.Ed. 1298. Those cases were considered by the Supreme Court in its decision in *Delgadillo v. Carmichael,* 332 U.S. 388, 68 S.Ct. 10, 92 L.Ed. 17. That was a case, like the present one, where the fact of entry had to be established in order to show conviction of a turpitude crime within five years. When the shipwrecked seaman returned to this country from the foreign port, the Supreme Court refused to characterize such arrival as an entry for such purpose. The Supreme Court cited *Di Pasquale v. Karnuth,* 158 F. 2d 878, and distinguished the three cases named as cases where the alien plainly expected or planned to enter the foreign country. The Court said that in the *Delgadillo* case the alien was forced to go, did not select the place, and that to treat his return as an "entry" within the law would be to give the law a "capricious application". Appellant here argues that his departure from the United States at the age of 16 under orders from his employer to deliver goods

across the border, if the government had proved such fact, was likewise a case where he was forced to leave, where he did not select the place, and where he did not voluntary depart. The case is similar to *Valenti v. Karnuth,* 1 F.Supp. 370, 373, where the schoolboy was taken to Canada on a picnic. The reasoning of the Court in that case is sound: The boy was not possessed of freedom to decide whether to go or not to go; "He is not a free agent acting entirely of his own volition."

Due process to one side, the arrival shown in the record has validity as an "entry" only if the law is misapplied. The government urges upon this Court a false premise: No matter what the circumstances of the departure, any arrival thereafter is an entry. In the words of the Supreme Court in the *Delgadillo* case (p. 391): "Respect for the law does not thrive on captious interpretations."

CONCLUSION.

Since the government has elected to attempt to deport appellant under 1929 proceedings, this Court has the power to test those proceedings for fairness, due process, and foundation in evidence.

The record shows that the government did not present any evidence of entry; the finding of entry was based solely upon purported admissions of the minor alien while in prison without guardian or counsel. Based upon said admissions, it was found that an

entry had been made. Said finding resulted from a misapplication of the law.

That the former proceedings were unfair and without due process and based upon incompetent evidence has not been refuted by the government other than by a simple denial.

Appelllant respectfully submits that justice and fairness require that the deportation order be nullified.

Dated, San Francisco, California,
October 3, 1958.

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APPELLEE'S REPLY BRIEF.

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APPELLEE'S REPLY BRIEF.

JURISDICTION.

By his petition for a writ of habeas corpus appellant sought and obtained a judicial review of the administrative record of the appellee wherein appellant was determined to be an alien illegally in the United States, and whereby he was ordered deported. Jurisdiction of the District Court is specified in Title 28 U.S.C. 2241 and appeal to this Court in Section 2253 of the same title.

The necessity for resorting to habeas corpus as the means of judicial review followed the action of re-

spondent in taking petitioner into custody on January 8, 1958.

From the decisions of this Court of Appeals, the scope of judicial review, whether by habeas corpus after custody or by petition for review prior to custody, would appear to be similar.

Shaughnessy v. Pedreiro, 349 U.S. 48;

Rystad v. Boyd (9th Cir.), 246 F.2d 246, cert. den. 355 U.S. 912, 967;

Leonard Cruz-Sanchez v. Robinson, 249 F.2d 771.

STATUTES.

8 U.S.C. Sec. 1252 (Immigration and Nationality Act 1952, Section 242)

. . .

(e) Any alien against whom a final order of deportation is outstanding by reason of being a member of any of the classes described in paragraphs (4) . . . of section 1251 (a) of this title. (f) Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the

date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation.

8 U.S.C. Sec. 1251 (Immigration and Nationality Act 1952, Sec. 241)

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

. . .

(4) is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, . . .

8 U.S.C. 1182 (Immigration and Nationality Act 1952, Sec. 212)

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States;

. . .

(17) Aliens who have been arrested and deported, or who have fallen into distress and have been removed pursuant to this chapter or any prior act, or who have been removed as alien enemies, or who have been removed at Government expense in lieu of deportation pursuant to section 1252(b) of this title, unless prior to their embarkation or reembarkation at a place outside the United States or their attempt to be admitted from foreign contiguous territory the Attorney General has consented to their applying or reapplying for admission.

8 C.F.R. Sec. 242.6

Aliens deportable under section 242(f) of the act. In the case of an alien within the purview of section 242(f) of the act, the order to show cause shall charge him with deportability only under section 242 (f) of the act. The prior order of deportation and evidence of the execution thereof, properly identified, shall constitute prima facie cause for deportation under that section.

8 C.F.R. 242.3

Aliens confined to institutions; incompetents, minors—(a) Service. If the respondent is confined in a penal or mental institution or hospital and is competent to understand the nature of the proceedings, a copy of the order to show cause, and the warrant of arrest, if issued, shall be served upon him and upon the person in charge of the institution or hospital. If the respondent is not competent to understand the nature of the proceedings, a copy of the order to show cause, and the warrant of arrest, if issued, shall be served only upon the person in charge of the institution or hospital in which the respondent is confined, such service being deemed service upon the respondent. In case of mental incompetency, whether or not confined in an institution, and in the case of a child under 16 years of age, a copy of the order and of the warrant of arrest, if issued, shall be served upon such respondent's guardian, near relative, or friend, whenever possible.

8 C.F.R. 242.22

Proceedings under section 242 (f) of the act—(a) Applicable regulations. Except as hereafter

provided in this section, all the provisions of §§ 242.8 to 242.21, inclusive, and § 242.23 shall apply to the case of a respondent within the purview of § 242.6.

(b) Deportability. In determining the deportability of an alien alleged to be within the purview of § 242.6, the issues shall be limited solely to a determination of the identity of the respondent, i. e. whether the respondent is in fact an alien who was previously deported, or who departed while an order of deportation was outstanding; whether the respondent was previously deported as a member of any of the classes described in paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a) of the act; and whether respondent unlawfully reentered the United States.

(c) Order. If deportability as charged pursuant to § 242.6 is established, the special inquiry officer shall order that the respondent be deported under the previous order of deportation in accordance with section 242 (f) of the act, or shall enter such other order as may be required for the appropriate disposition of the case.

Immigration Act of May 26, 1924

Sec. 14. (8 U.S.C. 214 (1946 ed.)) Any alien who at any time after entering the United States is found to have been at the time of entry not entitled under this Act to enter the United States, or to have remained therein for a longer time than permitted under this Act or regulations made thereunder, shall be taken into custody and deported in the same manner as provided for in sections 19 and 20 of the Immigration Act of

1252(f), the previous order of deportation was deemed to be reinstated from its original date and appellant was ordered deported thereunder.

An appeal to the Board of Immigration Appeals was dismissed January 6, 1958.

The petition for writ of habeas corpus herein was filed January 9, 1958. The writ was denied on February 12, 1958, and the notice of appeal was filed February 14, 1958.

Exhibit 3 of the Certified Record (Exhibit 1) is the Record of Sworn Statement of appellant dated August 9, 1957. On page 4 he claims first entry to the United States about the 12th of October, 1912, at the Port of Providence, Rhode Island. Exhibit 2 of the Certified Record contains the 1929 record, which was made a part of the 1957 proceedings. Appellant in his statement of March 14, 1929, and May 14, 1929, claimed to have first entered the United States at New York, October 8, 1916.

Exhibit 3, page 7 and the May 14, 1929 statement, disclose that in 1926 appellant served four months in the Preston School of Industry at Ione, California, on a charge of forgery.

Exhibit 3, pages 7 and 8 also disclose that appellant has a wife living in Portugal from whom he has not been divorced. This was his second marriage. The number of children from the two marriages is not indicated.

Appellant claims two illegitimate children in Porterville are dependent upon him for support, although

as of August 9, 1957, a "paternity action" was pending against him in Tulare County.

The statement of March 14, 1929, signed by appellant (Ex. 2 of Ex. 1), contains the admission that he left the United States February, 1926, going to Mexico, and that he entered the United States at Calexico, California, in February, 1926, without inspection. The statement of May 14, 1929, contains a similar admission.

A warrant was issued by the Assistant Secretary of Labor on June 7, 1929, and charged "that the alien Jose Marcus Souza or Joseph Marcus Souza (appellant herein, Exhibit 3, page 1) who landed at the port of Calexico, California, on or about the 15th day of February, 1926, has been found in the United States in violation of the Immigration Act of February 5, 1917, for the following among other reasons:

That he has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: Issuing bank checks with intent to defraud committed within five years after his entry."

The hearing on the warrant was held at San Quentin on October 4, 1929. A copy of the Report of Hearings is attached hereto as Appendix "A".

QUESTIONS PRESENTED.

Upon appellant's specification of errors, appellee frames the following questions:

(1) The petitioner having been found to be deportable under 8 U.S.C. 1252(f), was respondent required to entertain a collateral attack upon the 1929 final order under which petitioner was previously deported?

(2) Should the Court below have reviewed the 1929 order?

(3) Assuming review of the 1929 order does the record disclose lack of due process or absence of a fair hearing or any other infirmity?

ARGUMENT.

The appellant was deported on December 2, 1930, pursuant to the final order of the Assistant to the Secretary of Labor of November 21, 1929, and the warrant of deportation issued December 5, 1929 (Exhibit 2). The said final order was made following the recommendation of the Chairman of the Board of Review.

Appellant unlawfully entered the United States June 29, 1957, from Mexico. He was not in possession of a valid immigration visa or a valid non-immigrant visa or permit to enter as a visitor nor had he obtained the consent of the Attorney General (8 U.S.C. 1182(a)(17)). He was destined to Porterville, California, and intended to stay permanently.

From appellant's statement (p. 5) Exhibit 3 of the certified record (Ex. 1) and his passport, Exhibit 4, at least three entries to the United States as a non-immigrant were effected prior to June 29, 1957.

The first, on June 13, 1951, at New York on a transit certificate, ultimate destination Canada. He entered Canada June 14, 1951, and returned June 18, 1951, by air, reentering the United States at New York. He returned to Portugal sometime in August, 1951.

The second entry was effected November 29, 1951, on a non-immigrant visa as a temporary visitor. The passport Exhibit 4 contains no visa, admission stamp or other information beyond the non-immigrant visa dated November 20, 1951.

According to appellant's statement, page 5 (Ex. 3) he departed the United States in February, 1953, at New York.

The third entry was effected September 27-29, 1953, at San Ysidro, California. Appellant claims a new passport was issued, but that the non-immigrant visa on the old passport was still valid. He claims he surrendered the 1953 passport when a third passport was issued in 1955.

Following the entry in 1953 at San Ysidro appellant remained in the United States until December 14, 1956, when he entered Mexico intending to make a "very brief visit." He reentered the United States at Christmas on a 72 hour permit.

He was given no permit of any sort when he was admitted at San Ysidro in 1953 and his recollection (page 6) is that he was admitted for 30 days.

At no time prior to 1957 was any claim made by appellant that he was entitled to enter the United States because of any illegality of the deportation of 1930. No application was made to the attorney general in accordance with 8 U.S.C. 1182(a)(17) for consent to apply for admission. The record does not disclose whether he made any other unlawful entries between December, 1956, and June, 1957.

I. A DETERMINATION OF DEPORTABILITY UNDER SEC. 242(f) DOES NOT PERMIT A COLLATERAL ATTACK ON THE REINSTATED ORDER OF DEPORTATION.

This Court is familiar with the basis upon which a final order of deportation is to be reviewed judicially both before and after the 1952 Act. An exhaustive collection of the cases is contained in the annotation to *United States ex. rel. Knauff v. Shaughnessy,* 94 Law.Ed. 317 at page 332.

The specific statute under which appellant was determined to be deportable is 242(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1252(f)). This section was carried forward from section 20 of the Immigration Act of 1917 as amended by the *Internal Security* Act of 1950, Sec. 23 (8 U.S.C. 156(d), 1946 ed. Supp. IV. Subdivision (d) of Sec. 20 of the 1917 Act had been added as an amendment by Sec. 23 of the Internal Security Act of 1950, Sep-

tember 23, 1950. Section 156(d) was repealed by the 1952 Immigration and Nationality Act but was reenacted in said Act as Section 242(f), Title 8 U.S.C.A. 1252(f), which provides:

> "Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry. For the purposes of subsection (e) of this section the date on which the finding is made that such reinstatement is appropriate shall be deemed the date of the final order of deportation."

Appellee has been able to find only one case concerned with Sec. *242(f), United States ex rel. Blankenstein v. Shaughnessy,* June 12, 1953, S.D.N.Y. 112 F.Supp. 607. In that case a petition for writ of habeas corpus was filed in May, 1953. The warrant charged that the alien was deportable on four separate grounds, all under Sec. 241(a) (8 U.S.C.A. 1251 (a)). Petitioner had been ordered deported by a final order of deportation in 1924. The order had not been immediately executed, but in May of 1930 the petitioner had left the United States. The legality of the warrant of arrest was attacked on the ground that the Attorney General was compelled to reinstate the order of May, 1924, in that the "sole and exclusive"

remedy for deporting him was governed by Section 242(f). On this point Judge Weinfeld at page 610 held:

> "There is no automatic reinstatement of the previous order of deportation. Section 242(f) specifically provides '*Should the Attorney General find* that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation . . . the previous order of deportation shall be deemed to be reinstated from its original date . . .'. (Emphasis supplied.) Thus the Attorney General is required to make a finding (1) that the alien whose deportation is now sought is the same person against whom the previous order of deportation was issued; (2) that he either previously departed or had been deported as a member of the classes enumerated in §242(e) of the Act; and (3) that he had unlawfully reentered. 8 C.F.R. §242.75. Then and only then is the previous order of deportation reinstated. And such findings by the Attorney General may be made only after notice of the charge to the alien and a hearing thereon. Sec. 242(b) of the Act, 8 U.S.C.A. 1252(b); see also 8 C.F.R. 242.73. In other words, a charge that an alien is deportable because he illegally reentered after he had either departed or had been deported under a prior order of deportation is treated, with exceptions not here material, in the same manner as any other charge upon which an alien's deportation is sought."

Appellant *de Souza* was ordered deported on one charge: Section 242(f) — previously deported on

grounds enumerated in Section 242(e). A hearing was held on this charge. Appellant was determined to be the same person who was deported on December 2, 1930, on a final order of deportation and warrant issued thereon on a ground enumerated in §242(e), to wit: §241(a)(4)—convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution for a year or more. He admittedly reentered the United States unlawfully at San Ysidro, California, on June 27, 1957. Appellant does not challenge the hearing on the determination of the essential elements for reinstatement of the previous order. He admits he is the person deported in 1930 on a charge under 242(e) and that he unlawfully reentered the United States in 1957. He admits he had no consent of the Attorney General to reenter as required by 8 U.S.C. 1182(a)(17). By his petition he seeks to reopen the 1929 proceedings and review the order on which he was deported in 1930.

Appellant de Souza does not contend that there was any failure to comply with the requirement of §242(b) (8 U.S.C.A. 1252(b)) in so far as the determination was made under §242(f) that the prior order of deportation be deemed reinstated. His contention goes to claimed infirmities in the 1929 proceedings. As the Court below said (tr. 16) "The petitioner would have this Court disinter his first deportation order which was issued in 1930 and examine the evidence on which it was based."

(1) Under §242(f) appellant may not challenge the prior order reinstated.

The key to Sec. 242(f) is "unlawfully reentered." The Court will readily acknowledge the necessity for reaching finality in orders, judgments and decrees. The burden upon one who would attack a judgment long since final is heavy. Assuming the collateral attack may be made, the manner in which it is made must be lawful. By Section 242(f) Congress has precluded an attack upon the prior order by a person who gained *unlawful reentry* to the United States. If there is a challenge to the legality of an order of deportation which has been executed by the deportation of the alien, it should be made directly by the seeking of lawful entry. The alien then places himself in the same position as any other alien seeking entry. Sec. 212 (8 U.S.C.A. 1182) and 236 (8 U.S.C.A. 1226) would be applicable.

Appellant *de Souza* had many opportunities from 1951 to 1957 to have sought legal entry to the United States if there were any merit to his contentions herein. He made no attempt to obtain the consent of the Attorney General (8 U.S.C. 1182(a)(17)). He apparently had no difficulty prior to December 1956 in entering as he pleased on the documents in his possession.

(2) Absent. Sec. 242(f), the Court will not examine the previous order unless convinced there was a gross miscarriage of justice.

United States ex rel. Steffner v. Carmichael, 183 F.2d 19 (5th Cir.) cert. den. 340 U.S. 829, was a case

which arose prior to the Internal Security Act of 1950 and the amendment of Section 20 of the 1917 Act. Steffner had been deported in 1936 to Sweden. In 1941, he began shipping in and out of the United States as a seaman. In 1945 he reentered the United States as a member of a crew of a Swedish liner, deserted his ship and remained in the United States without a visa and without having secured permission of the Attorney General to apply for readmission. He was found deportable (1) in that he was an alien who admitted having committed a felony involving moral turpitude prior to entry, (2) he was an alien who had been arrested and deported in pursuance of law and to whom proper authority had not been given to reapply, and (3) he was an alien not in possession of a valid visa. Steffner filed a petition for a writ of habeas corpus. The question of primary concern presented was whether or not appellant should be allowed to make a collateral attack on the 1936 deportation order which he contended was illegal and void *ab initio*. The Court said at page 20:

> ". . . If we do allow such an attack, we must then examine the order ourselves to determine its validity."
>
> "Where an alien has been deported from the United States pursuant to a warrant of deportation, we do not think it permissible to allow a collateral attack on the previous deportation order in a subsequent deportation proceeding unless we are convinced that there was a gross miscarriage of justice in the former proceedings. There are numerous cases where aliens have been deported several times and if in each subsequent

case the validity of the previous deportation order had to be determined, there would be no end to the proceedings cast upon administrative agencies.

"Appellant did not elect to test the validity of his 1936 deportation order. He had his day before the immigration authorities who decided he should be deported. There is no showing that his failure to test the validity of this order was due to any cause other than his desire not to do so. Even if we were to concede that we should examine the order entered in his 1936 deportation proceeding, appellant would not be in any better position than he is now, because we are of the opinion that such an order was valid when entered, and since it has not been set aside in any way, it remains valid."

United States ex rel. Rubio v. Jordan (7th Cir.), 190 F.2d 573 (July 24, 1951);

United States ex rel. Beck v. Neely (7th Cir.), 202 F.2d 221;

Daskaloff v. Zurbrick (6th Cir.), 103 F.2d 579.

Assuming that notwithstanding the express language of Section 242(f), the Court may in a proper case examine the record of the administrative proceedings of the reinstated order, the test of such a proper case would be a *gross miscarriage of justice.* No such finding could be made in this case. The record of Jose Dias de Souza belies any miscarriage of justice let alone a *gross* miscarriage.

(3) Should the Court examine the record of the reinstated order such examination would be a review in accordance with the established principles.

(a) *Due Process:*

94 Law. Ed. 332;
Tisi v. Tod, 264 U.S. 131;
Zakanaite v. Wolf, 226 U.S. 272;
Low Wah Suey v. Backus, 225 U.S. 460;
Ng Fung Ho v. White, 259 U.S. 276.

(b) *Fair Hearing:*

94 Law. Ed. 332-33;
Tisi v. Tod, supra;
Vajtauer v. Comm'r., 273 U.S. 103, 71 Law. Ed. 560;
Chin Yow v. United States, 208 U.S. 8.

(c) *Evidence Must Support the Deportation Order:*

Bilokumsky v. Tod, 263 U.S. 149.

The requirement of reasonable substantial and probative evidence was added by the 1952 Act §242(b), 8 U.S.C. 1252(b).

Appellant herein was afforded due process and a fair hearing during the 1929 proceedings and the evidence not only supports the findings but is reasonable substantial and probative.

Del Guercio v. Delgadillo, 159 F.2d 130 (9th Cir.);
Steffner v. Carmichael, supra;
United States ex rel. Beck v. Neelly, supra;

DeBernardo v. Rogers (D.C. Cir.), 254 F.2d 81;

Bisaillon v. Hogan (9th Cir.), July 1, 1958. No. 15749.

(4) The determination that appellant in 1926 on "numerous occasions" and specifically February 15, 1926 reentered the United States after departure to Mexico was not an erroneous application of law.

Appellant having committed a crime involving moral turpitude for which he was sentenced to one to fourteen years in the State Prison at San Quentin can seek to avoid the impact of this fact on his status as alien by claiming it was not committed within five years after his entry. The crime having been committed in 1929 and appellant having departed the United States into Mexico in 1926, the only claim that can be made is "no entry."

Assuming of course that the Court reaches the matter of review of the 1929 order, the contention would be that of an erroneous application of law.

The decisions of the Supreme Court and the Ninth Circuit Court of Appeals permit no challenge to the determination that appellant made an entry in 1926.

United States ex rel. Claussen v. Day, 279 U.S. 398;

United States ex rel. Stapf v. Corsi, 287 U.S. 129;

United States ex rel. Volpe v. Smith, 289 U.S. 422;

Schoeps v. Carmichael, 177 F.2d 391 (9th Cir.), cert. den. 339 U.S. 914;

Cahan v. Carr, 47 F.2d 604 (9th Cir.);
Taguchi v. Carr, 62 F.2d 307 (9th Cir.);
United States v. Maisel, 183 F.2d 724 (3rd Cir.);
United States ex rel. Alcantra v. Boyd, 222 F.2d 445 (9th Cir.);
Talavera v. Barber, 231 F.2d 524 (9th Cir.);
Zurbrick v. Borg, 47 F.2d 690 (6th Cir.);
Pimental-Navarro v. Del Guercio (9th Cir.) No. 15745, June 12, 1958.

Appellant relies on *Valenti v. Karnuth,* 1 F.Supp. 370, and *Wong Yuen v. Prentis,* 234 F. 28. These two cases are not subsequently cited as authority in any of the cases to which the Courts attention has been called above. In *United States ex rel. Dombrowski v. Karnuth,* 19 F.Supp. 222, the *Valenti* case is cited as in conflict with the weight of authority.

Appellant cites *Ex Parte T. Nagata,* 11 F.2d 178, to which might be added *Nakasuji v. Seager* (9th Cir.), 3 F.Supp. 410, aff. 73 F.2d 37, cert. den. 294 U.S. 714. In each of these cases the alien went fishing in Mexican waters. The holding was no entry on return. No landing at any foreign port had been effected.

Weedin v. Okada, 2 F.2d 321 (9th Cir.), upon which appellant places some reliance, is cited in *Ex Parte Delaney,* 72 F.Supp. 312. The District Judge referred to the *Okada* case in footnote 11, page 319 ". . . which decision antedates the group of decisions under discussion, and which it would seem has been

subsequently overruled by the Ninth Circuit." *Ex Parte Delaney* came to this Court of Appeal as *Carmichael v. Delaney,* 170 F.2d 239, and the District Court was reversed (1948). At page 242 this Court said:

> "Does the return of a resident under these circumstances constitute an entry within the intendment of the immigration laws? We think not. It is true that until very recently except for an enlightened decision of the Second Circuit, *DiPasquale v. Karnuth,* 158 F.2d 878, the Federal Courts had fallen into the habit of treating every arrival from a foreign port or place as an entry no matter what the circumstances or however harsh and unanticipated might be the consequence to the individual."

Judge Rudkin's opinion in *Matsutaka v. Carr,* 47 F.2d 601, clarifies the distinction between *United States ex rel. Claussen v. Day,* 279 U.S. 398, and *Carmichael v. Delaney, supra.* At page 601 he said,

> "In other words in the Claussen case the Court was only concerned with the fact of entry, while in this case we are chiefly concerned with the right of entry."

In other words the person who had shipped on an American vessel as a member of the crew, could not be excluded as not in possession of proper documents upon his return aboard the same ship even though the ship may have touched at a foreign port. But if the alien committed a crime involving moral turpitude within five years of such return, although he could not have been excluded at the time of such reentry

nevertheless the *fact* of entry fixed the time insofar as the five years was involved.

Delgadillo v. Carmichael, 332 U.S. 388, decided by the Supreme Court in 1947, permitted a technical avoidance of the doctrine of *United States ex rel. Claussen v. Day, United States ex rel. Stapf v. Corsi* and *United States ex rel. Volpe v. Smith,* supra, and the *fact* of entry. The Court said, page 390,

> "Here he was catapulted into the ocean, rescued, and taken to Cuba. His itinerary was forced on him by wholly fortuitous circumstances."

Delgadillo had shipped out of Los Angeles on an intercoastal voyage to New York as the member of the crew of an American merchant ship. The ship was torpedoed after passing through the Panama Canal. He was rescued and taken to Havana, Cuba, and returned to the United States. The Supreme Court held,

> "We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous as capricious as those which the Immigration Service has here seized."

Appellee does not believe appellant can derive any comfort from *Delgadillo v. Carmichael,* and whether we look to the law as of 1929, which would not have required considering the *Delgadillo v. Carmichael* or *Carmichael v. Delaney* deviations or to the law today, appellant made an entry in 1926.

CONCLUSION.

Appellee submits:

(1) Section 242(f) requires the determination of the essential elements of identity, prior deportation and unlawful entry to reinstate the previous order and the Court cannot review the administrative record out of which the prior order was made.

(2) Assuming the Court may review the old record, a showing of a gross miscarriage of justice must be made. No such showing has been made here.

(3) Assuming the record is reviewed, this Court must conclude the hearing was fair, there was due process, the evidence supports the findings and there was no erroneous application of law.

Dated, San Francisco, California,
August 25, 1958.

Respectfully submitted,

ROBERT H. SCHNACKE,
United States Attorney,

CHARLES ELMER COLLETT,
Assistant United States Attorney,

Attorneys for Appellee.

(Appendix "A" Follows.)

Appendix "A"

Appendix "A"

File No. 12020/15653

Report of Hearing in the Case of
Jose Marcus Souza or Joseph Marcus Souza

Under Department warrant No. 55670/55.

Dated Washington, D. C., June 7, 1929.

Hearing conducted by Inspector J. A. Neilson, J.

At San Quentin, Calif., Dated 10-4-29.

Alien taken into custody at California State Prison, San Quentin, October 4, 1929, at 2:00 P.M., by Inspector J. A. Neilson, Jr. and detained in above institution.

Testimony taken and transcribed by S. A. Byrne, Jr., Stenographer.

Said alien being .....able to speak and understand the English language satisfactorily ..... interpreter, named ....., competent in the ..... language, was employed .....

Said alien was informed that the purpose of said hearing was to afford him an opportunity to show cause why ...he should not be deported to the country whence ...he came, said warrant of arrest being read and each and every allegation therein contained carefully explained to him. Said alien was offered an opportunity to inspect the warrant of arrest and the evidence upon which it was issued, which privilege

was ..... accepted. The alien being first duly sworn ....., the following evidence was presented:

Q. What is your correct name?

A. Joseph Marcus Souza.

Q. Have you ever been known by another name?

A. No.

Q. You are advised that under these proceedings you have the right to be represented by counsel. Do you desire to obtain the services of a lawyer?

A. No. I can handle this myself.

Q. Do you waive your right to be represented by an attorney and are you now ready and willing to proceed with this hearing?

A. Yes.

Q. You are advised that Attorney W. D. Hahesy, of Tulare, California, has stated that he wished to be present at this hearing. Is it your wish that he be present at this hearing and represent you in these proceedings?

A. No. He was not hired by me. I don't want his services whatsoever.

Q. You waive your right to the services of Attorney Hahesy?

A. Yes.

By Inspector:

You are advised that the burden of proof is upon you to show that you entered the United States lawfully and the time, place and manner of such entry. In presenting this proof, you are entitled to the production of your immigration visa, if any, or any documents pertaining to your entry now in the custody of the Department of Labor.

Q. Did you make a sworn statement to an Inspector of the Immigration Service at this prison, May 14, 1929?

A. Yes.

Q. Are all the answers given by you at that time true and correct?

A. Yes.

Q. Have you any changes to make in that statement? (Alien reads statement.)

A. No.

By Inspector:

You are advised that the sworn statement mentioned is now incorporated in and made a part of this record.

Q. Have you any evidence to offer or reasons to give why you should not be deported on the charge contained in the warrant of arrest?

A. I was working for Mr. A. C. Glass, who is in the produce business at the Terminal Market, 7th and Central, Los Angeles, and in the course of my duties I crossed the line into Mexico on numerous occasions. I never did stay over there more than an hour and a half at any time. I never lived in Mexico. All my people are here. They are taxpayers and haven't been out of the country for about 18 years. I was raised and educated here, and know no other country whatsoever. The reason I am not a citizen is because I haven't reached my majority. My two brothers are naturalized citizens. (Alien advised regarding penalty for illegal reentry.)

Q. Have you anything further to state?

A. No.

Summary:

This alien is a male, 19 years of age, auctioneer, single, native of Azores Islands, subject of Portugal, Port. race, who last entered the United States without inspection at Calexico, Calif., during the month of February, 1926. He has been sentenced, subsequent to May 1, 1917, to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, to wit: issuing bank checks with intent to defraud—committed within five years after entry.

Recommendation:

The charge contained in the warrant of arrest is sustained by the record. It is recommended that the alien be deported.

J. A. Neilson, Jr.,
Immigrant Inspector.

I certify that the foregoing is a true and correct transcript of the record of hearing in the above case.

S. A. Byrne, Jr.,
Stenographer. bk. 13663.

No. 15917

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. B. FRASER, R. B. FRASER, INC., a corporation; R. B. FRASER, JR., FRASER LIVESTOCK CO., a corporation, and CHARLES FRASER, also known as CHAS. FRASER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

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Appeal from the United States District Court
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United States Court of Appeals

FOR THE NINTH CIRCUIT

R. B. FRASER, R. B. FRASER, INC., a corporation; R. B. FRASER, JR., FRASER LIVESTOCK CO., a corporation, and CHARLES FRASER, also known as CHAS. FRASER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' REPLY BRIEF

INTRODUCTORY MATTER

It is not our purpose in this reply brief to consider in detail each of the arguments presented in the brief of the Appellee. Our purpose is to present as briefly as possible a demonstration of the basic flaws contained in those arguments and the matter hereinafter presented is intended to relate to Appellee's entire brief and argument.

ARGUMENT

Trespass within the meaning of 25 U. S. C. Sec. 179 and 25 C. F. R. Section 71.21.

The Appellee argues that a willful intent is not required to constitute a trespass under Section 25 U. S. C. 179 and 25

C. F. R., Section 71.21, and support this position in citing the case of *United States vs. Thompson, 41 F. Supp. 13 (E. D. Wash., 1941),* wherein the Court in passing said:

> "The defendant attempts to distinguish the cases on the grounds that they both involve actual or intended trespasses upon the part of the owners of the cattle. Well, that is true, and, strictly speaking, the two cases can be of value in cases of similar import, nevertheless, I am convinced from the language of the two opinions that they compel acceptance of the conclusion that the holding would have been the same without evidence as to intention of trespass."

Whether or not the Court in the *Shannon* and *Light* cases would have held the same although actual willful trespass was not shown is, of course, speculative; however, these cases can be distinguished from the case at bar in that they involve an interpretation of "willful" under the Federal Statutes and Regulations pertaining to grazing on forest reserve. The instant case involves a willful trespass upon Indian lands under Section 179 and the Code of Federal Regulations enacted thereunder.

In *Janus vs. United States, 38 Fed. (2d) 431,* this very Court reviewed the history of the present law. This history of the enactment of Section 179 indicates that "not only a willful act was intended but willful as contemplated in a criminal action." In order to determine the meaning we have but to turn to the case of *U. S. vs. Illinois Central R. Co., 303 U. S. 239, 58 S. Ct. 533,* where the Court said:

> "Mere omission with knowledge of the facts is not enough. The penalty may not be recovered unless the carrier is shown to wilfully to have failed. In statutes denouncing offenses involving turpitude, 'wilfully' is generally used to mean with eil purpose, criminal intent or the like. But in those denouncing acts not in themselves wrong, the word is often used without any such implication."

25 C. F. R. 72.21 does not in words necessarily broaden

the scope of *25 U. S. C. 179* to be unconstitutional but the interpretation given these regulaions in this case by the Appellee amount to the same. Regardless of the wording of the code of Federal Regulations, its effect can be no broader than the heretofore given interpretation of Section 179. In attempting to make a finding of livestock upon a reservation land without a permit a violation of Section 179 and Title 25 C. F. R., Section 71.21 is to extending the original Act into something which was not intended at the time the Act was passed or even conemplated.

It is true that the fence laws have no application to the commission of a trespass under 25 U. S. C., Section 179, and that the States cannot pass laws regulating government land held in the name of the United States Government. However, neither can the Secretary of the Interior through its Indian Departments interpret regulations extending the authority of the Indian Department and the Department of the Interior so as to change the meaning of Section 179 as enacted and followed by our Courts. It is the position of the Appellants that both the United States as Trustee of Indian lands and Guardian thereover, and the Appellants are left at a status quo and that if either wishes to prevent the drifting of livestock onto its premises where no willful intent is shown, then they are bound to fence livestock out. To hold otherwise would be a reversal of the open range policy and a reversion to English common law; a policy repudiated by our Courts in *Buford, et al vs. Houtz, 133 U. S. 320, 105 S. Ct. 305.*

INJUNCTION

Appellee's argument for the right to an injunction distinguishes the case at bar from the case of *LaMotte vs. United States, 256 Fed. 5 (C. A., 8, 1919 Affirmed 254 U. S. 570)*

on the grounds that in this case there was a finding of permanent injury to the inheritance. A careful reading of the testimony of the Government witness, Gordon S. Powers, (Tr. 190-191), shows that Mr. Powers, after qualifying as an expert made a general statement as to the results of over-grazing. He made no mention nor was any showing made that the land involved in this action was being overgrazed, or that the Appellants' cattle were committing any permanent damage to the land. Mr. Robert Yellowtail, a long time resident, rancher, and one-time superintendent of the Crow Indian Agency, stated that in his judgment this land was subject to very little, if any, permanent effect from overgrazing.

The evidence shows that the land in effect was open range and that Appellants had leased same from the Indian Service. The livestock of the Appellants and the livestock of the Lessees of the Government, the Cormier Bros., drifted back and forth upon the land, that the water in the area was on the Appellants' land and that there was more of an inclination for the livestock in the vicinity o stray onto the land of the Appellants than on the land allegedly trespassed upon by their cattle and therefore, this case is directly in point with *LaMotte vs. the United States,* and should be dealt with accordingly.

PENALTIES

The Appellee contends that on the basis of the evidence before the Court, the parties intended that the penalty clause in the range control stipulations was properly construed as a liquidated damage clause and that Appellee's statement in claim for relief in this complaint is not disproportionate to the damages sustained. Appellee asked in its complaint for a total sum of $5,159.85 for two separate trespasses by the Appellant in the same year.

The trial court in rejecting the Government's contention that it could recover more than once during a lease year said:

> "If the penalty is, in fact, liquidated damages, it must be based on a contract provision for year around grazing, and it was not inended that the payments should be due each time overstocking was found to exist. Each overstocking might properly be considered an act of trespass under the on and off provision, in which event the Government would be limited to $1.00 per head for each separate trespass. If there could be more than one recovery under paragraph 3 of the stipulations, the amount would be an unreasonable forecast of just compensation and could not properly be considered liquidated damages."

Under every consideration of all the facts, and the pleadings in the case, it is readily apparent that the Appellee brought this action under the guise of a penalty, and after failing to show that any actual damage on the part of the Appellants would now interpret the clause as liquidated damages.

The purpose of the Court in this case is to determine the meaning of the penalty clause at the time of execution of the agreements. Up until the trial of the issue there was no controversy as to its meaning. The Appellee should not at this stage be allowed to make one.

Based upon the foregoing and upon our original brief herein, we submit that no willful trespass has been proved as required under Section 25, U. S. C., Section 179; that the United States is not entitled to an injunction, that the penalty provision in the range controls stipulation where the penalty is designated and not a provision for liquidated damages and that the judgment appeal by the Appellants should be reversed.

Respectfully submitted,

KURTH, CONNER & JONES

By:.....

Attorneys for the Appellants.

No. 15,917

In the United States Court of Appeals for the Ninth Circuit

R. B. FRASER; R. B. FRASER, INC., a corporation; R. B. FRASER, JR.; FRASER LIVESTOCK COMPANY, a corporation; and CHARLES FRASER, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

Upon Appeal from the United States District Court for the District of Montana

BRIEF FOR THE UNITED STATES, APPELLEE

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CITATIONS

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No. 15,917

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BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The opinion of the court below is reported at 156 F.Supp. 144. The findings of fact and conclusions of law appear at pages 73-84 of the printed record.

JURISDICTION

This is an appeal from the judgment of the district court entered November 21, 1957 (R. 108-111). Notice of appeal was filed December 16, 1957 (R. 111). The jurisdiction of the district court of this

suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sec. 1291.

STATUTES INVOLVED

The Act of June 30, 1834, 4 Stat. 730, as amended R.S. sec. 2117, 25 U.S.C. sec. 179, provides:

> Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands.

The Act of June 18, 1934, 48 Stat. 984, 986, as amended 25 U.S.C. sec. 466, provides:

> The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

25 C.F.R. sec. 71.1 provides: [1]

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[1] The numbering system of Title 25 of the Code of Federal Regulations was revised in 1957. Former section 71 was changed to 151. The subsections remain the same. For consistency with proceedings in the trial court, the old system will be followed herein.

General authority. It is within the authority of the Secretary of the Interior to protect Indian tribal lands against waste. Overgrazing, which threatens destruction of the soil, is properly considered waste. Subject to regulations authorized by law, the right exists for Indian tribes and individual Indians to lease or grant permits upon their own tribal land or individual allotments.

25 C.F.R. sec. 71.3 provides, in part, as follows:

Objectives. It is the purpose of the regulations in this part to aid the Indians in the achievement of the following objectives:

(a) The preservation through proper grazing practice of the forest, forage, land, and water resources on the Indian reservations, and the building up of these resources where they have deteriorated.

* * * *

25 C.F.R. sec. 71.21 provides, in part, as follows:

Trespass. The owner of any livestock grazing in trespass on restricted Indian lands is liable to a penalty of $1 per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed.

The followings acts are prohibited:

(a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit.

(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit.

* * * *

QUESTIONS PRESENTED

1. Whether appellants' acts in allowing their livestock repeatedly to drift and graze on Indian land, without consent, subjected them to the trespass penalty provided by Congress in 25 U.S.C. sec. 179 for driving or otherwise conveying livestock onto such land.

2. Whether the United States was the proper party plaintiff to bring suit to enjoin trespass on Indian land leased to a non-Indian lessee.

3. Whether a provision in the grazing contract for payment of 50 percent of the normal fees, in addition to the regular charges for each head of stock in excess of the authorized number, was a penalty or provision for liquidated damages.

STATEMENT

This action was instituted by the United States in its sovereign capacity for the use and benefit of the Indians of the Crow Indian Reservation and the Crow Indian Tribe in Montana (Fdg. I, R. 74). Title to the lands involved herein was at all times in the plaintiff in trust for the benefit of the members of the Crow Tribe, subject only to duly approved leases and grazing permits (Fdgs. I, II, IV; R. 74-75). The complaint in nine counts sought recovery of the statutory penalty of $1.00 per head of livestock for trespass by appellants, defendants below, on certain Indian land; an injunction to prevent future acts of trespass; and damages measured by regular grazing fees plus 50 percent thereof for overgrazing in violation of the appellants' grazing permit (R. 3-17).

The facts as found by the court below may be summarized as follows:

The Government alleged (R. 6-9), and the court found on the basis of the evidence presented, that on three separate occasions appellants' livestock had drifted and grazed on Indian lands on which appellants did not have a lease, permit, license or privilege;[2] the court further found that the animals were allowed to drift and graze upon the Indian lands wrongfully, wilfully and without the consent of the Indian owners (Fdgs. V, VII, VIII; R. 76-77). The court concluded that appellants' cattle were in trespass in violation of 25 U.S.C. sec. 179 and 25 C.F.R. sec. 71.21, a duly promulgated and existing regulation of the Secretary of the Interior (Concl. II, R. 81); and that appellants were liable in the amount of the penalty as set forth in that statute and repeated in the regulation (Concls. IV, VI, VII; R. 82).[3]

With respect to injunctive relief, the court further found that over a period of years some 12 instances had occurred wherein appellants had allowed their stock to drift or graze upon Indian trust land upon which appellants had no permit, lease or privilege, knowingly and wilfully, without consent, and in defiance of the appellee and its officers and employees

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[2] This land was under lease by the Indians to a non-Indian lessee, Cormier Bros.

[3] Recovery for an alleged trespass occurring in 1943 was denied on the grounds that the time for an action for a penalty had run and the suit was barred by the provisions of 28 U.S.C. sec. 2462 (Concl. III, R. 81). This point is not raised on appeal.

(Fdgs. IX, X, XII; R. 77-78). The court found that continued trespassing threatens overgrazing, that overgrazing causes permanent damage to the inheritance of the land and that the resulting damage is difficult of exact computation (Fdg. XIII, R. 78-79). Accordingly, the court concluded that, to prevent a multiplicity of suits and because the Government had no plain, speedy and adequate remedy at law, it was entitled to a permanent injunction, enjoining appellants from allowing livestock to drift and graze on Indian trust lands without a permit (Concl. VIII, R. 82-83).

As to damages for overgrazing on permitted land, the court found that the Crow Indian Agency, on November 17, 1950, had issued a grazing permit (R. 18-19) to R. B. Fraser, on behalf of all appellants, by which they were permitted to graze livestock, not to exceed a designated number, on a range unit which included Indian trust lands (Fdgs. XIV, XV; R. 79-80). Fraser signed and accepted the permit together with the stated conditions and the Range Control Stipulations annexed thereto (R. 23-37). The permit was to run for a period beginning December 1, 1950, to November 30, 1955. The maximum carrying capacity of the unit, which included privately leased or owned lands and Indian lands, was set forth with the annual fees due therefor.

The court found that on two occasions in the same year appellants had exceeded the maximum number of livestock permitted on the unit (Fdg. XVI, R. 80). Paragraph 3 of the Range Control Stipulations provided that, "if the number authorized is exceeded,

without previous authority, the permittee will be required to pay in addition to the regular charges as provided in the permit, a penalty equal to 50 per cent thereof for such excess stock * * *" (R. 24). Pursuant to this provision, the Government sought recovery in two counts for payment of the regular charges and a sum equal to 50 percent thereof for the excess stock on each of the two occasions of overgrazing (Counts Seven and Eight, R. 11-14). The court concluded that the Government was entitled to recovery for only one occasion of overgrazing during the year, and arrived at the amount of recovery pursuant to the foregoing provisions as liquidated damages on the basis of the largest number in excess at any one time during the year (Concl. IX, R. 83). In its opinion, the court explained that the provision was actually for liquidated damages and was not a penalty, because it was "a reasonable forecast of just compensation for the harm caused by the breach" (R. 104). It held that recovery could not be had for each overstocking, because it was based on the contract provision for year-round grazing (R. 104).

Finally, the court found that appellants had failed to pay the grazing fees set forth in the permit for the month of December 1954 (Fdg. XVII, R. 80), and concluded that they were liable for such charges (Concl. X, R. 83).

Judgment was entered pursuant to the findings and conclusions on November 21, 1957, in the amounts of $105.00 as trespass penalty, $1,262.93 as damages for overgrazing and $114.64 for unpaid grazing fees, plus interest (R. 108-111).

SUMMARY OF ARGUMENT

1. Appellants have argued that a wilful intent to commit trespass is necessary under 25 U.S.C. sec. 179 and cite several cases to prove their point. However, each of their cases can be clearly distinguished on the grounds that (a) they do not relate to a statutory trespass, and (b) none of the cases declare, even in the absence of statute, that, as to Indian reservations or reserved public lands, wilful intent must be present. Assuming, *arguendo*, that wilful intent is necessary, it is present here from the repeated trespasses by appellants in careless disregard for the property rights of adjacent owners, and in defiance of the government officials. The continuing nature of the trespasses here justify a finding of wilful intent. While there is no showing that appellants drove their cattle upon the Indian land, they could and should have reasonably anticipated that their livestock would drift onto these lands and subject them to the penalty prescribed by statute.

Appellants contend that the regulation, 25 C.F.R. sec. 71.21, is invalid because it goes beyond the scope of the Act. However, in the first place, appellants have failed to bear the burden required to show the invalidity of the regulation. Moreover, it is clear from the wording of the regulation that it is not inconsistent with the Act, being plainly within the authorized objectives of Congress.

2. Even though the land was under lease to a non-Indian lessee, the Government is a proper party plaintiff because an injury to the reversionary interest through trespass of a third party is actionable by the

landlord, and it is indisputable that the Government may maintain the action for the landlords here as trustee for its Indian wards.

3. The provision for payment of the regular charges plus a "penalty" equal to 50 percent thereof for grazing of stock in excess of the authorized number under the permit is a provision for liquidated damages. It is not a penalty because it is a reasonable forecast of just compensation for the harm caused by the breach, and the harm is one that is incapable or very difficult of accurate estimation. The term "penalty" used in the contract is not controlling; the court must look to what the parties intended. The intention was that the provision was for liquidated damages, for it was made directly proportionate to the damage sustained.

ARGUMENT

I

Appellants' Acts Constituted Trespass Within the Meaning of 25 U.S.C. Sec. 179 and 25 C.F.R. Sec. 71.21

Appellants have made two points in their argument seeking to establish that they are not liable for trespass damages. In their first point, it is argued that the fact that their livestock was allowed to drift onto non-permitted lands did not constitute trespass within the meaning of 25 U.S.C. sec. 179. Secondly, appellants argue that the definition of the acts constituting trespass stated in the Department of the Interior regulations, 25 C.F.R. sec. 71.21, goes beyond the scope of section 179 and is void as an unauthorized enlargement of the statute.

A. ***A wilful intent is not required to constitute trespass under 25 U.S.C. sec. 179, but, even so, such intent exists here.***

1. *A wilful intent is not necessary:*—Appellants have taken the position that the terms "driving or otherwise conveying" livestock, as used in section 179, mean that some action must be taken by the livestock owner requiring a wilful intent to convey the animals onto non-permit lands, and that since appellants' actions in not preventing the cattle from drifting could be more aptly described as "passive," they contend that they have not committed a trespass within the meaning of the Act. It is the Government's position, on the other hand, that trespass is committed within the meaning of the act, as reasonably interpreted by the regulations, where cattle are allowed to drift onto non-permit lands. Appellants seek to support their argument that an element of wilfulness is necessary to establish a trespass under section 179 by two cases: *Light* v. *United States*, 220 U.S. 523 (1911); *Shannon* v. *United States*, 160 Fed. 870 (C.A. 9, 1908). Those decisions do not support appellants' contentions.

The *Light* case, *supra*, was an action to enjoin a rancher from pasturing his cattle on public lands specifically set aside as a forest reserve in violation of certain rules and regulations established by the Secretary of the Interior for the protection of the forest reserves. It appears from the facts in that case that it was the natural proclivity of cattle turned loose on adjacent private lands to drift onto the forest reserve in search of better grazing and water. The court said at p. 538: "It appears that the defendant

turned out his cattle under circumstances which showed that he expected and intended that they would go upon the Reserve to graze thereon." The *Shannon* case, *supra*, arose in the same Montana federal district court as the instant case. There, also, the Government sought to enjoin a rancher from pasturing his cattle on forest reserve lands. The facts indicated that the rancher's land was bounded on three sides by the forest reserve. "Of course," the court said, "he knew they [the cattle] would not and could not remain in the inclosure, for there was no water there, nor sufficient pasturage for so large a herd. They did as he evidently expected them to do. They went through the convenient openings which he had made in his fence for that purpose." These two cases were construed in *United States* v. *Thompson*, 41 F.Supp. 13 (E.D. Wash., 1941), as follows:

> The defendant attempts to distinguish the two cases on the ground that they both involved actual or intended trespasses upon the part of the owners of the cattle. While that is true, and, strictly speaking, the two cases can be of value in cases of similar import, nevertheless I am convinced from the language of the two opinions they compel acceptance of the conclusion that *the holdings would have been the same without evidence as to intention of trespass.* [Emphasis added.]

As these decisions and common knowledge show, where there is unfenced open range, drifting of livestock is almost inevitable unless affirmatively prevented, and section 179 must be viewed with that set-

ting in mind. Thus, that statutory definition of a trespass includes all the elements required to establish liability thereunder and a showing of wilful intent is not included as one of them.

2. *A wilful intent was present:*—The trial court found that there was a wilful intent on the part of appellants to allow their livestock to drift and graze on the Indian lands involved without consent (Fdgs. V, VII, VIII; R. 76-77). The finding is amply supported by such substantial evidence as the repeated acts of invasion (Fdgs. V, VII, VIII, X, XII; R. 76-78) and the ignoring and defiance of many requests for removal by the government officials (Fdg. XI, R. 78).

In *United States* v. *Illinois Cent. R. Co.*, 303 U.S. 239 (1938), the Supreme Court presented an excellent definitive statement, which was relied on by the court below, relative to the meaning of the term "wilful." "Our opinion in *United States* v. *Murdock*, 240 U.S. 389, 394, shows that it ["wilfully"] often denotes that which is 'intentional, or knowing, or voluntary, as distinguished from accidental,' and that it is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act.' " And, quoting from *St. Louis and S.F. R. Co.* v. *United States*, 169 Fed. 69, 71 (C.A. 8, 1909), the court proceeded to state: " 'So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.' "

It is appellants' position that, absent a showing of wilful intent, the single fact the cattle were on non-permit land is not violative of the statute. However, something more than simply being on the land was present in this case. Appellants have completely overlooked the fact that their cattle were found on the land far more than the number of times which would invite a conclusion of occasional straying. And it is on these facts of repeated and innumerable instances of drifting that a wilful intent is established—clearly within the statement in the *Illinois Central* case, *supra.*

B. *Section 71.21 of the regulations does not broaden the scope of the Act.*

Proceeding to the second half of appellants' argument, to wit, that section 71.21 of the regulations is invalid because it changes the law as set forth in section 179, it should be noted initially that the general rule is well established that one attacking a regulation bears the burden of showing its invalidity; and this burden can only be carried by showing, as a minimum, that the regulation is inconsistent with the underlying statute or is unreasonable or inappropriate. *Montana Eastern Limited* v. *United States*, 95 F.2d 897 (C.A. 9, 1938); *United States* v. *Watkins*, 173 F.2d 599 (C.A. 2, 1949), affirmed 338 U.S. 537; *McMahon* v. *Ewing*, 113 F.Supp. 95 (S.D. N.Y., 1953); *Blackmar* v. *United States*, 120 F. Supp. 408 (C.Cls. 1954). It could hardly be more obvious that with only the statement that the Department of the Interior has legislated, and no more, appellants have completely failed to carry this burden (Br. 10).

Moreover, the attention of the court is directed to the Act of June 18, 1934, 48 Stat. 984, 986, as amended 25 U.S.C. sec. 466 (p. 2, *supra*), where the Secretary of the Interior was authorized by Congress to promulgate such rules and regulations "as may be necessary to protect the range from deterioration." Title 25 C.F.R. sec. 71.1 (now sec. 151.1, p. 3, *supra*) states, "It is within the authority of the Secretary of the Interior to protect Indian tribal lands against waste. Overgrazing, which threatens destruction of the soil, is properly considered waste." And in Title 25 C.F.R. sec. 71.3 (now 151.3, p. 3, *supra*), the objectives of the regulation include: "(a) The preservation through proper grazing practice of the forest, forage, land, and water resources on the Indian reservations, and the building up of these reservations where they have deteriorated."

25 U.S.C. sec. 179 (p. 2, *supra*) provides that "Every person who drives or otherwise conveys any * * * cattle * * * to range and feed" on Indian lands without consent is liable to a penalty of one dollar per head of such stock.

Pursuant to the foregoing authority, and within the stated objectives of the regulations, the Secretary issued regulation 71.21 (now 151.21, p. 3, *supra*). Section 71.21 provides that: "The owner of any animal grazing in trespass on any restricted Indian land, is liable to a penalty of $1 per head for each animal thereof, * * * ." The regulation lists thereunder the following acts as prohibited:

> (a) The grazing upon or driving across any restricted Indian lands of any livestock without

an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit.

(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit.

It is clear that section 71.21 is within the scope of the authorizing act (25 U.S.C. sec. 466) and consistent with the foregoing statements of the objectives of the Secretary's grazing policies. Suits to enjoin trespass have upheld similar regulations in *United States* v. *Johnston*, 38 F. Supp. 4 (S.D. W.Va., 1941), and *United States* v. *Travis*, 66 F.Supp. 413 (W.D. Ky., 1946). Thus Congress has provided the outline and prescribed the penalty; it was left to the Secretary to fill it in. *United States* v. *Grimaud*, 220 U.S. 506 (1911). Section 71.21 is entirely consistent with section 179 of the Act. The statute described the wrongful act as one who "drives or otherwise conveys." The regulation amplified these terms for purposes of clarification. There appears to be no reasonable difference in effect between the terms "otherwise conveys" and affirmatively "allowing to drift." If there is a distinction, it is one of degree only and is hardly such as to warrant a conclusion of inconsistency. *United States* v. *Morehead*, 243 U.S. 607 (1917); *Boske* v. *Comingore*, 177 U.S. 459 (1900). Furthermore, it is readily apparent that the broader and more general term used in the statute includes that used in the regulation. The conclusion cannot be other than to uphold the validity of the regulation.

C. *Fence laws have no application to the commission of trespass under 25 U.S.C. sec. 179.*

Appellants have presented a series of cases and arguments to the effect that the open-range law requiring a landowner to fence out trespassing cattle is applicable to this case. However, it is obvious that this contention is clearly in error. Appellants have not cited a single authority to the effect that 25 U.S.C. sec. 179 requires the Government to erect a fence to prevent a rancher from "driving or otherwise conveying" his cattle onto Indian lands. Section 179 was originally enacted by the Act of June 30, 1834, 4 Stat. 730, and a study of the annotated cases reveals no instance where such a defense has been raised during the entire 120 years that the statute has been in effect. The reason for the absence of such a defense is apparent. Congress has paramount power to legislate for the protection of the lands of its Indian wards. (See, *infra*, pp. 16-17.) It has legislated here and thereby preempted the field to the exclusion of any conflicting local law. Clearly, then, where the act prohibited by the statute is proven, fencing laws have no application.

II

The United States Is A Proper Party Plaintiff

There can be no question of the right of the United States to initiate a suit for the protection of the rights and property of its Indian wards. It has been repeatedly stated that, "as guardian of such Indians, the Government stands charged with all the obligations attending such a relationship. It not only has

the power to institute actions to preserve the rights of its wards, * * * but it is its duty to do so when those rights are threatened." *Mashunkashey* v. *United States*, 131 F.2d 288 (C.A. 10, 1942), citing *Heckman* v. *United States*, 224 U.S. 413 (1912).

Appellants contend that the United States was not the proper party to institute this action, but that the white lessee, Cormier Bros., should have brought this suit since the trespass was a violation of their possessory interest. In support of this position, appellants rely upon a ruling in *LaMotte* v. *United States*, 256 Fed. 5 (C.A. 8, 1919), affirmed 254 U.S. 570, that a lessee of an Indian lessor was the proper party to bring suit to enjoin trespass on the unfenced leasehold. The court decided this question on the express basis that under the facts of that case; "Such trespass does not injure the freehold nor affect the allottee lessor." It is readily apparent from that statement that, unlike the present case, there was no finding of a permanent injury to the inheritance.

The instant case is plainly to the contrary on that point; it was alleged, proved by evidence, and found by the court, "* * * that overgrazing causes permanent damage to the inheritance of the land, * * *. Continued trespassing by defendants threatens overgrazing and consequent irreparable damage and injury to the inheritance of the lands" (Fdg. XIII, R. 78). As to the right of the landlord to sue, "An injury to the trees or timber on the demised premises may be an injury to the reversion for which the landlord may sue." 32 Am. Jur. 93, Landlord & Tenant, sec. 80. "The usual remedy of a landlord whose re-

versionary interest is injured by another's wrongful act is by way of an action at law for damages, although in a case of injury by reason of the maintenance of a nuisance by a third person, he may bring an action in equity to abate the nuisance." 32 Am. Jur. 96, Landlord & Tenant, sec. 86.

Clearly, therefore, there can be no disputing the right of the United States to maintain an action to enjoin trespass of Indian lands. It was well stated in *United States* v. *Colvard*, 89 F.2d 312 (C.A. 4, 1937), that:

> * * * for the protection of the lands which are the subject-matter of the trust, the United States may ask an injunction against repeated trespasses which adjacent landowners threaten to continue, the decision in the Wright case [*United States* v. *Wright*, 53 F.2d 300 (C.A. 4, 1931)] virtually determines it. That case establishes the right of the United States as trustee of the lands to seek injunction for the protection of the interest of the Indians therein; and it is, of course, well settled that injunctive relief is proper against continuing trespass or against repeated trespasses where there is threat of continuance and the remedy at law is inadequate or multiplicity of suits would be avoided by equitable remedy. [Citations.]

It follows that in the instant case the United States has the power to bring suit for the protection of the rights of its Indian wards for injury to their reversionary interests.

III

The "Penalty" Provision In the Range Control Stipulations Was Correctly Construed As A Provision for Liquidated Damages

Under the terms of the grazing permit, appellants were limited to grazing a designated number of head on the permitted land. The Range Control Stipulations, which were made a part of the permit, provided that, "if the authorized number were exceeded without previous authority, the permittee will be required to pay, in addition to the charges as provided by permit, a penalty equal to 50 per cent thereof for such excess stock and the stock will be held until full settlement has been made" (Range Control Stipulations, Par. 3; R. 24). In Counts Seven and Eight of the Government's complaint recovery was sought for such excess grazing fees for overstocking.

Appellants contend that the "penalty" provision was in fact a penalty, and in the absence of the Government's proof of actual damages, there can be no recovery. The Government contended that the provision was actually for liquidated damages. In sustaining the Government's position, the court wrote an exhaustive opinion which is hereby adopted as to this point and made a part of this brief (R. 96-106). In holding that the provision was for liquidated damages, the court stated that, "The excess charge is a reasonable forecast of just compensation for the harm caused by the breach, and the harm is one that is incapable or very difficult of accurate estimation." Thus, it falls within the exception to the general rule against determining damages in advance of breach.

Restatement of the Law of Contracts, sec. 339. The court observed that under section 71.1 of the regulations promulgated by the Secretary of the Interior "overgrazing which threatens destruction of the soil is properly considered waste, * * * and unquestionably such harm in any particular case would be difficult of accurate estimation" (R. 102). The court had previously found that overgrazing causes permanent damage and that the damages were difficult to determine (Fdg. XIII, R. 78-79).

The opinion also quoted extensively from the case of *United States* v. *Bethlehem Steel Co.*, 205 U.S. 105 (1907), wherein the Supreme Court of the United States, faced with a similar problem, stated, "The question always is, what did the parties intend by the language used?" Appellants raise the point in their brief that the word "penalty" is used in the stipulation and that it was the intention of the parties to regard it as such. The court in the *Bethlehem* case, *supra*, had this to say regarding a similar contention:

> * * * It is true that the word "penalty" is used in some portions of the contract * * *. The word "penalty" is used in the correspondence, even by the officers of the government, but we think it is evident that the word was not used in the contract nor in the correspondence as indicative of the technical and legal difference between penalty and liquidated damages.

It was obvious to the court, on the basis of the evidence before it, that the parties intended the provision to be liquidated damages. This view is supported by the surety requirement provision of sec.

71.17 of the regulations, to apply such surety bond or deposit "as liquidated damages in the event of any breach of the permit."

Appellants' concluding statement on this question, furthermore, is grossly in error. While correctly stating the law that a fixed sum bearing no proportional relation to damage will be construed as a penalty, appellants state, without any basis in fact whatsoever, that "* * * the amount asked for relief under the complaint is disproportionate to the damages sustained * * *" (Br. 13). Nothing could be more directly related to the damage sustained than a prorated charge based on each head of cattle in excess of the authorized number.

Thus, as the foregoing authorities show, since the type of damage here is uncertain and difficult of ascertainment and since it is proportionately related to the degree of damage inflicted by each animal, the district court correctly held that the provision involved was for liquidated damages and not a penalty. See also *Steffen* v. *United States*, 213 F.2d 266 (C.A. 6, 1954).

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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JULY 1958

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No. 15917

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

R. B. FRASER, R. B. FRASER, INC., a corporation; R. B. FRASER, JR., FRASER LIVESTOCK CO., a corporation, and CHARLES FRASER, also known as CHAS. FRASER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

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Appeal from the United States District Court for the District of Montana

SUBJECT INDEX

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MISCELLANEOUS

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Identification of Exhibits:

IN THE

United States Court of Appeals

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Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

JURISDICTION

This is an appeal from the final judgment (Tr. 108) entered on the 21st day of November, 1957, in Cause No. 15917. On the 16th day of December, 1957, the Appellants filed a notice of appeal (Tr. III). Jurisdiction of the District Court rests upon 28 U.S.C.A., Sec. 1345, 62 Stat. 933. The jurisdiction of this Court is under 28 U.S.C.A., Sec. 1291, 62 Stat. 929. The Court is hereby referred to paragraphs I, II, III and IV, (Tr. 3-5) of the Appellee's Complaint for the pleadings verifying the existence of the jurisdiction of the United States District Court for the District of Montana, Billings Division. This action was instituted by the United States in its sovereign capacity for the use and benefit of the Indians of the Crow Indian Tribe.

STATEMENT OF THE CASE

This action was dismissed as to the defendant, Charles Fraser, he having died prior to trial of the cause and it having been stipulated in the pre-trial order (Tr. 71) that the cause be dismissed as against Charles Fraser, also known as Chas. Fraser.

The Appellants' statement of the case does not contain any matters in reference to the Court's ruling on Appellee's First and Third causes of action, the Appellee having dismissed his cross-appeal on the 25th day of April, 1958.

The Plaintiff-Appellee in its sovereign capacity, instituted this action asking in the first five counts (Tr. 6-8) of its complaint for the statutory penalty of $1.00 per head for livestock trespassing upon Indian lands, the statute creating said liability being 25 U.S.C.A., Sec. 179, which reads as follows:

> "*Driving stock to feed on lands.* Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to raneg and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands."

The sixth count (Tr. 9) contains allegations to support an injunction. The seventh (Tr. 11) and eighth counts (Tr. 13) are based on a contractual obligation contained in a grazing permit (Tr. 24) which provides as follows:

> "*Excess or deficit of the number of stock specified.* Unless the number of livestock specified in the permit is reduced by the Commissioner of Indian Affairs, the permittee will not be allowed credit or rebate in case the full number is not grazed on the area. However, if the number authorized is exceeded, without previous authority, the permittee will be required to pay, in addition to the regular charges as provided in the permit, a penalty equal to 50% thereof for such excess stock and the stock will be held until full settlement has been made."

The issues of law involved in this appeal are:

1. Were the Appellants' livestock in trespass within the provisions of 25 U.S.C., Sec. 179.

2. Is Section 25 C.F.R., Sec. 71.21, as interpreted by the Appellee, an attempt to enlarge Sec. 25 U.S.C. Sec. 179.

3. Was the Appellee a proper party plaintiff in this action?

4. Was subsection 3 of the range control stipulation, in reference to charges for exceeding the authorized limits of the permit, a penalty clause or an agreement for liquidated damages?

The testimony at the trial showed the Appellants both owned and leased land within the boundaries of the Crow Indian Reservation, interspaced and adjacent to lands both owned by Joe and Clem Cormier, herein designated as Cormier Bros. The Cormier Brothers were the permittees under leases and permits for use of range unit 22. That the deeded land, leased land and permitted land of the Cormier Bros. were in the most part, unfenced. That the land wherein the alleged trespass occurred was unfenced and adjacent to land either owned by the Appellants or on which they had a lease or permit from the Crow Indian Agency. That cattle placed on any of the lands owned, leased or permitted to the Appellants, or cattle placed upon lands owned, leased or permitted to the Cormier Bros. wherein these alleged trespasses took place, could drift and travel over the entire area herein involved. That the evidence relied on by the Appellee in support of the action for trespass, an injunction was the finding of varying numbers of the Appellants' cattle on land permitted or leased to the Cormier Bros. The evidence relied on by the Appellee in support of its seventh and eighth counts in its complaints, was the finding of an excess number of livestock on range unit 19, permitted to the Appellant, R. B. Fraser, on two separate occasions.

SPECIFICATIONS OF ERROR

1. That the District Court erred in deciding that on February 13, 1952, 82 cows owned by the Appellant, R. B. Fraser, and managed or herded by him or his agents and servants, were found in trespass upon Indian Trust lands within the Crow Indian Reservation.

2. The Court erred in holding and deciding that on or about July 8, 1955, 9 horses and 3 mules owned by the Appellants, R. B. Fraser, Inc., and R. B. Fraser Livestock Company, were found in trespass upon Indian Trust lands within the Crow Indian Reservation.

3. The Court erred in holding and deciding that on or about July 28, 1955, 8 cows and 3 calves owned by the Appellant, R. B. Fraser, and managed and herded by him or his agents or servants, were found in trespass upon Indian Trust lands within the Crow Indian Reservation.

4. The Court erred in holding and deciding that from time to time over the period from 1945 to the filing of the original action, Appellants have allowed cattle and horses to drift and graze upon the lands of the Crow Indian Reservation on which they held no valid lease or grazing permit; that the drifting and grazing of said livestock was done or permitted by the Appellants, knowingly, wilfully and without the consent of either the Indians affected thereby or the superintendent of said reservation and in defiance of the plaintiff and its officers and employees having the supervision and management of said lands.

5. The Court erred in holding and deciding that the Appellants, or their agents or servants caused or permitted livestock to drift or graze upon Indian Trust lands within the Crow Indian Reservation and upon which the Appellants had no per-

mit, lease or privilege whatever between June 12, 1945, and March 27, 1957.

6. The Court erred in holding and deciding that the Appellee is entitled to a permanent injunction against the Appellants, and each of them.

7. The Court erred in failing to hold and find that that certain regulation of the Department of the Interior of the United States, 25 C.F.R., 71.21 (b), is unreasonable and inconsistent with Sec. 25, U.S.C. 179, and thereby invalid.

8. The Court erred in finding that the United States was the proper party plaintiff and in failing to find that the lessee or permittee was the party to bring any action or injunction herein; in holding and deciding that the penalty clause under subsection 3 of the Range Control stipulation, as set forth in Plaintiff's Exhibit No. 9, was a liquidated damage clause and not a penalty clause. The Court erred in failing to dismiss the seventh and eighth counts of Appellee's Complaint.

SUMMARY OF THE ARGUMENT

1. The only element of proof shown by the evidence as to the Appellants' trespassing was the finding of the Appellants' livestock on land not permitted to them, this land being adjacent to land owned or leased by the Appellants and unfenced, and the mere fact the Appellants' livestock were found on lands not permitted or leased to them, does not constitute a trespass.

2. The interpretation of the Appellee that the finding of livestock on unfenced land held in trust by the United States for the Indian allottee, is an interpretation of of 25 C.F.R., Sec. 71-21 which exceeds the traditional interpretation given Sec. 25 U.S.C., Sec. 179, and is uncinstitutional.

3. The lands on which the livestock of the Appellants were found, were lands either leased to or permitted to the Cormier Bros. and they were the proper parties to bring the trespass or injunction action, they being the parties in legal possession of the lands and these remedies asked for in the Appellee's complaint.

4. That subsection 3 of the Range Control stipulation, being possessory remedies, which is by reference incorporated in the permit contract between Appellant, R. B. Fraser, and the Appellee, was a penalty clause, treated as such by the Appellee and designated as such by it and sued upon by the Appellee as a penalty. No proof of damages having been shown, the seventh and eighth count should have been dismissed.

ARGUMENT

In the 2nd, 3rd, 4th and 5th counts of its complaint, the Appellee seeks to recover the penalty prescribed by Title 25, U.S.C. Sec. 179, which provides as follows:

> "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands. (R.S. #2117; Mar. 1, 1901, c. 676, * 31 Stat. 871.)"

Supplementing the statute, the Department of Interior adopted the following regulation:

> "71.21 Trespass. The owner of any livestock grazing in trespass on any restricted Indian land, is liable to a penalty of $1 per head for each animal thereof, together with the reasonable value of the forage consumed and damages to property injured or destroyed."

"The following acts are prohibited:

(a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit.

(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit." *(25 C.F.R. 1956 Supp. 71.21.*

The proof as submitted by the Appellee did not constitute trespass under *25 U.S.C. Sec. 179, supra,* prior to the enactment of the Department of Interior of *25 C.F.R. Sec. 71.21, supra.* In the leading case of *Light v. The United States, 220 U.S. 523, 55 L. Ed. 570, 31 S. Ct. 485,* and in *Shannon v. United States, 9 Cir., 160 F. 870, 875,* and in all other cases of alleged trespass on Government land heretofore determined, be it held in trust for Indian or public domain, the Courts have found an element of wilful and overt trespass by the defendant or have found him to have placed his livestock on land so that their natural inclination in seeking forage and water, would be to go upon the Government held lands. No such act of wilful trespass or placing of cattle so as to constitute a wilful trespass, has been proven against the defendant in the instant case. The only showing made by the Appellee was that livestock of the Appellants were found on land permitted or leased to the Cormier Bros. The evidence of the Appellee, taken in its most favorable light, shows livestock of the Appellants on range unit 22 in the latter part of January and the forepart of February, 1952. These cattle were part of a large number of cattle grazing on what was open and unfenced range land within the boundaries of the Crow Indian Reservation.

Evidence shows that the Appellants owned a considerable amount of land within range unit No. 22 and large sections of land adjacent and next to range unit No. 19 where these

claims of trespass are laid. This land, in most part, is unfenced and cattle can roam and graze from said Appellants' land and other lands thereabout, at will. The question of trespass is then narrowed down to whether or not a party who places cattle upon his own unfenced land is liable for the penalty in *Sec. 25, U.S.C., Sec. 179,* for trespass if said cattle are found upon unfenced Indian Trust land permitted or leased under a possessory right to white citizens—in this case, another large cattle operator, the Cormier Bros.

Although the rule at common law was that a landowner was not bound to fence his land against the livestock of others. *Lazarus v. Phelps, 152, U.S. 81-85, 14 S. Ct. 477, 478, 38 L. Ed. 363, Buford v. Hautz, 133 U.S. 320, 10 S. Ct. 305,* this rule has never been adopted in the United States. *Light v. The United States, 220 U.S. 523, 537, 55 L. Ed. 570, 31 S. Ct. 485.* The precise question raised here is whether that doctrine pertains when the United States as the sovereign Government, in its category as guardian of Indian Trust lands is a party to the action.

In finding the Appellants were trespassing, by the showing made here by the Appellee, was a repudiation of the position previously taken by the United States Supreme Court in *Light v. United States, supra.*

In *Light v. The United States, supra,* our Supreme Court said:

> "In this country in the progress of the settlement, the principle that a man was bound to keep his cattle confined within his grounds or else he would be liable for their trespass on the unenclosed grounds of his neighbor, was never adopted or recognized as the law of this country."

Furthermore, the evidence shows that the people for whose benefit this lawsuit was being brought was not the Indian allot-

tee, but the white lessee, in the instant case, the Cormier Bros. For these lands, whether they be leased under permit, competent or incompetent office leases, were at all times during the alleged trespasses, in possession of white lessees. The only loss due to the alleged trespass, if any, was to the Cormier Bros. and the only trespass, if any, was on lands leased and in possession of the Cormier Bros.

The evidence in this case shows that the Cormier Bros. and the Appellants have been having trouble over grass on the Crow Indian Reservation for many years and this is the first time the Indian Department, in the name of the Appellee, has seen fit or been talked into taking sides in a neighborhood squabble. On the contrary, it has always been the policy to stay out of these controversie. *LaMott v. United States, 256 Fed. 5, 254 U.S. 570.*

The sustaining of the position of the Appellee, in effect, amounts to the adoption of the English common law doctrine of fencing cattle in and means that any individual Indian or white, who either owns land within the boundaries of the Reservation or leases, or is a permittee within the confines of said boundaries, has to fence every unit of land which he possesses or he would be liable for the penalty of the above section on which this action is based. Instead of protecting the individual Indian allottee's interest in his lands, it will ultimately work to his detriment and he will be at the mercy of a few operators and land owners, if any, who can afford to fence each piece of land on which they have a permit or a lease, and, ultimately, will limit the marketability of the allottee's land.

Furthermore, in finding the defendants in trespass, under the evidence presented in this case, in effect is giving an interpretation of Section 25 U.S.C., 179, which heretofore has not

been given, or results, in effect, in allowing the Department of Interior to legislate rather than regulate. It may well be that the interpretation heretofore given Sec. 25 U.S.C. 179, supra, may not be practical due to the change in livestock operations, but is a subject for Congress to determine and to pass a law changing the established law. Neither the courts nor the Department of the Interior, through the Bureau of Indian Affairs, has that Constitutional right. Therefore, we are bound by the laws as they exist and as they have previously been interpreted by our Courts.

INJUNCTION

The Appellee's sixth cause of action is for an injunction for trespass by the Appellants within the confines of the Indian Reservation. Before the United States is entitled to an injunction, it must show that there has been a wrongful invasion of its possessory interest either in itself as owner or as representative and guardian of an Indian allottee. In the case of *LaMott v. United States, 256 Fed. 5, 254 U.S. 570, supra*, where owners of land adjacent permitted cattle to pass on into grass on unfenced Indian land where another had a valid approved lease, the Court held that the Government was without authority to maintain an injunction to restrain the grazing or trespass, stating such a trespass does not injure the fields, nor affect the Allottee Lessors. The wrong is to the Lessee alone and he has a legal remedy and he alone. The Government is not concerned in and has no authority to protect such interest.

PENALTIES—LIQUIDATED DAMAGES

The Appellee's counts seven and eight are actions for penalties under the terms of a grazing permit between the Appellee

and the Appellant, R. B. Fraser. The question as to the penalty clause which is sued on is whether or not the clause, as recited in the contract, is a penalty clause or a clause for liquidated damages. The clause itself provides as follows:

> "*Excess or deficit of the number of stock specified.* Unless the stock specified in the permit is reduced by the Commissioner of Indian Affairs, the permittee will not be allowed credit or rebate in case the full number does not graze in the area. However, if the number authorized is exceeded without previous authority, the permittee will be required to pay, in addition to the regular charges as provided in the permit, a penalty equal to 50% thereof for such excess stock and the stock will be held until a full settlement has been made."

If the above clause is a penalty clause, then the seventh and eighth counts of the Appellee's Complaint should have been dismissed for in the case of a penalty clause, the measure of the damages is the ordinary actual loss, but in the case of liquidated damages, the whole amount is recoverable. *The Illinois Surety Co. v. United States, 229 Fed. 227, 143 C.C.A. 535.*

As a general rule, unless it is clear that the parties intended otherwise, the tendency of the Court is to regard stipulations in contracts, purporting to fix in advance, the sum to be paid in the event of breach, as in the nature of a penalty rather than as liquidated damages. *15 Am. Jur. 676, Corbin on Contracts, p. 283.*

If we turn to the allegations of the complaint (Tr. 11), we can readily see what was contemplated by the Government at the time of filing the action and what was in its mind at the time of entering into the contract with the Appellants, for the terms of the contract itself set forth that a penalty was contemplated (Tr. 44).

> "And if the number authorized is exceeded without previous authority, the permittees will be required to pay, in

addition to the regular charges as provided in the permit, a penalty equal to 50% thereof for such excess stock and the stock will be held until the full settlement will be made."

Where a sum in the contract is called a penalty, the sum will be held to be such where there is nothing in the nature of the contract to show a contrary intent. *15 Am. Jur. 679.* In the instant case, it is clear that the interpretation given the contract by the parties at the time of executing same, and the interpretation given it at the time of filing the lawsuit by the Appellee herein, was a penalty. The pleadings here involved, contemplated a penalty and not a contract for liquidated damages. In order for the Government to have properly pleaded a complaint for liquidated damages, it was necessary for it to plead and prove facts that would bring it within the exceptions of Sections 13-804 and 13-805, Revised Codes of Montana, 1947, which provides as follows:

Section 13-804, Revised Codes of Montana, 1947, provides:

> "*Contracts fixing damages void.* Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

Section 13-805, Revised Codes of Montana, 1947, provides:

> "*Exception.* The parties to a contract may agree upon an amount which shall be presumed to be an amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage,"

and was so held in *Associated Press v. Emmett, 45 Fed. Supp. 907,* and *Clifton v. Wilson, 47 Mont. 305, 312, 132 Pac. 424.* A complaint must aver the damages resulting from the alleged

breach of a contract. *Fed. Prac. and Proced., Sec. 259, Vol. 1, p. 458.* There is no allegation that it would have been impractical or extremely difficult to fix actual damages. *Stephens, et al. v. Daugherty, et al., 166 Pac. 375, 33 Cal. App. 733; Kelly v. McDonald, 276 Pac. 404, 98 Cal. App. 121; Johnson v. Cook, et al., 64 Pac. 729, 24 Wash. 474.*

The pleadings also show that a penalty was contemplated by the Appellee in that the amount asked for relief under the complaint is disproportionate to the damages sustained, for where the amount stipulated in the contract as liquidated damages for failure of performance and there is no relation to the actual damages which may be reasonably anticipated from such failure, the sum will be called a penalty. *Futrall v. Triplett, 84 Fed. 2d, 861, in re Gelmo's, Inc., 43 Fed. 2d 832, McCall v. Dupler, 174 Fed. 133, Management, Inc. v. Schassberger, 235 Pac. 2d, 293, 39 Wash. 2d, 321.*

CONCLUSION

For the foregoing reasons, it is submitted that the part of the judgment appealed from by the Appellants should be reversed.

Respectfully submitted,

KURTH, CONNER & JONES

By .....

Attorneys for the Appellants

No. 15917

United States
Court of Appeals
for the Ninth Circuit

R. B. FRASER, R. B. FRASER, INC., a Corporation; R. B. FRASER, JR.; FRASER LIVESTOCK COMPANY, a Corporation, and CHARLES FRASER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the District of Montana.

Phillips & Van Orden Co. 4th & Berry, San Francisco, Calif.—5-2-58

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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KEY TO BRAND REFERENCES

Clerk's Note:

Throughout this transcript particularly in the motion of the United States for Preliminary Injunction and in the reporter's transcript of testimony there are references to brand marks on cattle or horses.

For economy we are adopting the following references to be inserted in the transcript in lieu of actually drawing the brand marks; such numerals may be translated into the respective brands by a glance at the following table:

used to designate this brand  [13] is used to designate this brand 

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used to designate this brand 

In the United States District Court for the District of Montana, Billings Division

Civil No. 1804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. B. FRASER, R. B. FRASER, INC., a Corporation; R. B. FRASER, JR., FRASER LIVESTOCK CO., a Corporation, and CHARLES FRASER, Also Known as CHAS. FRASER,

Defendants.

COMPLAINT

First Count

For its first count, plaintiff complains and alleges:

I.

Plaintiff brings this action in its sovereign capacity for the use and benefit of the Indians of the Crow Indian Reservation and the Crow Indian Tribe, wherefore this Court has jurisdiction of the action.

II.

The Crow Indian Reservation is and at all times herein stated was a duly established Indian reservation under the laws of the United States, located within the State and District of Montana and within the Billings Division of said District, a plat of which is attached hereto as "Exhibit A" and made a part

hereof; that except for certain isolated tracts of land for which patents have been issued by plaintiff herein, the title to said lands in said reservation is and at all times herein states was in the plaintiff in trust for the Crow Indian Tribe or certain members thereof; that said land at all times herein stated was and now is managed and supervised by the plaintiff through its Agency created for that purpose, to wit, the Bureau of Indian Affairs.

III.

The defendant R. B. Fraser is and at all times mentioned herein was a citizen and resident of the State and District of Montana and within the Billings Division of the said District, and is and was the owner of lands and livestock and the lessee or grazing permittee of other lands, all of which are within the exterior boundaries of the Crow Indian Reservation. That defendant R. B. Fraser, Jr., is and was the owner of certain land within the exterior boundaries of the Crow Indian Reservation and is the son of defendant R. B. Fraser, and a stockholder in defendant R. B. Fraser, Inc., a corporation, being associated with defendant R. B. Fraser in the livestock business. That defendant Charles Fraser, also known as Chas. Fraser, is the brother of R. B. Fraser and associated with him in the livestock business on the Crow Indian Reservation. That defendants R. B. Fraser, Inc. and Fraser Livestock Co. are corporations organized and existing under the laws of the State of Montana in which defendants R. B. Fraser and R. B. Fraser, Jr., are stockholders.

IV.

Except for said patented lands, all other lands in the Crow Indian Reservation are and at all times herein stated were Indian trust lands, owned beneficially either by The Crow Tribe or by allottees who are members of said Tribe, or heirs of such members, and the right to the exclusive occupation and enjoyment thereof was and is in the said Indians subject only to duly approved leases and grazing permits.

V.

At all times mentioned herein there existed a duly promulgated and existing regulation of the Department of the Interior of the United States, (25 C.F.R., 71.21) which provided, in accordance with and supplementary to 25 U. S. Code 179, as follows:

> "§71.21 Trespass. The owner of any livestock grazing in trespass on restricted Indian lands is liable to a penalty of $1 per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed."

The following acts are prohibited:

> "(a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit."

> "(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit."

VI.

On or about December 31, 1943, sheep owned by said defendants or some of them and managed and herded by them or their agents and servants, to wit, 2,285 sheep, were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which the said defendants did not have a lease, permit, license or privilege whatever.

Said animals were driven, herded, drifted, grazed and allowed to be driven, herded, drifted and grazed upon plaintiff's said lands wrongfully, wilfully and without consent of the plaintiff or the Indian owners thereof, whereby under 25 U. S. Code 179 and Regulations 71.21 above set forth, a penalty of $1.00 per head, or a total of $2,285.00 was incurred, for which the plaintiff invokes the said law and regulations.

Second Count

For its second count, plaintiff reiterates and restates all that is alleged in paragraphs I, II, III, IV and V of the first count herein, and in addition thereto complains and alleges:

I.

On or about February 13, 1952, cattle owned by said defendants or some of them and managed and herded by them or their agents and servants, to wit, 82 cows and 2 steers were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which the said defendants did not have a lease, permit, license or privilege whatever.

Said animals were driven, herded, drifted, grazed and allowed to be driven, herded, drifted and grazed upon plaintiff's said lands wrongfully, wilfully and without consent of the plaintiff or the Indian owners thereof, whereby under 25 U. S. Code 179 and Regulation 71.21 above set forth, a penalty of $1.00 per head, or a total of $84.00 was incurred, for which the plaintiff invokes the said law and regulations.

Third Count

For its third count, plaintiff reiterates and restates all that is alleged in paragraphs I, II, III, IV and V of the first count herein, and in addition thereto complains and alleges:

I.

On or about January 5, 1955, cattle owned by said defendants or some of them and managed and herded by them or their agents and servants, to wit, 42 cattle were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which the said defendants did not have a lease, permit, license or privilege whatever.

Said animals were driven, herded, drifted, grazed and allowed to be driven, herded, drifted and grazed upon plaintiff's said lands wrongfully, wilfully and without consent of the plaintiff or the Indian owners thereof, whereby under 25 U. S. Code 179 and Regulation 71.21 above set forth, a penalty of $1.00 per head, or a total of $42.00 was incurred, for which the plaintiff invokes the said law and regulations.

Fourth Count

For its fourth count, plaintiff reiterates and restates all that is alleged in paragraphs I, II, III, IV and V of the first count herein, and in addition thereto complains and alleges:

I.

On or about July 8, 1955, horses and mules owned by said defendants or some of them and managed and herded by them or their agents and servants, to wit, 18 horses and 3 mules were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which the said defendants did not have a lease, permit, license or privilege whatever.

Said animals were driven, herded, drifted, grazed and allowed to be driven, herded, drifted and grazed upon plaintiff's said lands wrongfully, wilfully and without consent of the plaintiff or the Indian owners thereof, whereby under 25 U. S. Code 179 and Regulation 71.21 above set forth, a penalty of $1.00 per head, or a total of $21.00 was incurred, for which the plaintiff invokes the said law and regulations.

Fifth Count

For its fifth count, plaintiff reiterates and restates all that is alleged in paragraphs I, II, III, IV and V of the first count herein, and in addition thereto complains and alleges:

I.

On or about July 28, 1955, cattle owned by said defendants or some of them and managed and herded by them or their agents and servants, to wit, 8 cows and 3 calves were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which the said defendants did not have a lease, permit, license or privilege whatever.

Said animals were driven, herded, drifted, grazed and allowed to be driven, herded, drifted and grazed upon plaintiff's said lands wrongfully, wilfully and without consent of the plaintiff or the Indian owners thereof, whereby under 25 U. S. Code 179 and Regulation 71.21 above set forth, a penalty of $1.00 per head, or a total of $11.00 was incurred, for which the plaintiff invokes the said law and regulations.

Sixth Count

For its sixth count, plaintiff reiterates and restates all that is alleged in paragraphs I, II, III, IV and V of the first count herein, and in addition thereto complains and alleges:

I.

From time to time over a period of many years from 1943 to the filing of this Complaint, said defendants or some of them have driven, caused to be driven, drifted and allowed to drift, or herded upon the lands of the Crow Indian Reservation upon which they held no valid lease or grazing permit, large numbers of sheep, cattle and horses causing

said livestock to graze and pasture on said lands and to eat and destroy the grasses and other forage and herbage growing thereon, and to over-graze said lands. The driving, drifting and herding of said livestock was done by the defendants knowingly, wilfully and without the consent either of the Indians affected thereby or the Superintendent of said Reservation, and in defiance of the plaintiff and its officers and employees having the supervision and management of said lands. The said defendants further threaten to continue to perform said wrongful acts, and will if not permanently enjoined by this Court, repeat the same and persist in unlawfully causing such livestock to trespass on plaintiff's lands above described, causing financial damage to said Tribe, the persons composing the said Tribe, and irreparable damage and injury to the inheritance of said lands.

II.

In addition to the trespasses alleged in the first five counts herein, said defendants or some of them or their agents and servants, drove, herded, drifted and grazed or caused or permitted to be driven, herded, drifted and grazed upon Indian trust land within the Crow Indian Reservation and upon which said defendants had no permit, lease or privilege whatever, certain livestock as follows:

June 12, 1945—821 sheep.
January 28, 1952—300 cattle.
January 30, 1952—55 cattle.
February 4, 1952—73 cattle.
December 15, 1955—90 cattle.

III.

Defendants have repeatedly been requested by plaintiff to remove their trespassing livestock from said lands, but defendants have repeatedly caused and permitted such trespasses to continue, following a calculated plan or design to use said lands without payment therefor. Damage has resulted therefrom not capable of exact computation for the reason that the location is remote from available personnel to police said grazing lands, and many trespasses have occured which did not afford opportunity to count the animals involved. A multiplicity of actions would be required to recover damages for each transaction. By reason of the facts hereinabove stated in this paragraph and in paragraph I in this count, the plaintiff has no plain, speedy or adequate remedy at law, nor has it any remedy except through the equitable powers of this Court.

Seventh Count

For its seventh Count, plaintiff reiterates and restates all that is alleged in paragraph I of the first count herein, and in addition thereto complains and alleges:

I.

The Crow Indian Reservation is and at all times herein stated was a duly established Indian Reservation under the laws of the United States and treaties ratified by the United States, the title to which said lands is and was in the plaintiff in trust for said Indians, and which said lands at all times

were and now are managed and supervised by the plaintiff through its Agency created for that purpose, to wit, the Bureau of Indian Affairs. Said lands are all within the State and District of Montana and within the Billings Division of said District.

II.

The defendant, R. B. Fraser, is and at all times mentioned herein was a citizen and resident of the State and District of Montana and within the Billings Division of said District, and said defendant is the grazing permittee named in Exhibit B dated November 17, 1950, which Exhibit B was and is modified by Exhibit C dated February 23, 1952, both of which Exhibit B and Exhibit C are hereto attached and made a part hereof, together with the stipulations and schedules attached to Exhibit B.

III.

The lands described in Exhibit B and as modified by Exhibit C are and at all times herein stated were Indian trust lands, owned beneficially either by the Crow Tribe or by allottees who are members of said Tribe, or heirs of such members, and the right to the exclusive occupation and enjoyment thereof was in said Indians subject only to duly approved grazing permits.

IV.

That by the terms of Exhibit B the defendant, R. B. Fraser, was granted grazing privileges for 83 head of cattle for each grazing season and that by the terms of Exhibit C said permit was modified

by reducing the number of cattle from 83 to 82 per grazing season during the life of said permit. It is further provided by "Range Control Stipulations" attached to said Exhibit B that if the number of livestock authorized by the permit is exceeded, without previous authority, the permittee will be required to pay in addition to the regular charges, the penalty equal to 50% thereof for such excess stock.

V.

That on or about the 24th day of May, 1954, defendant R. B. Fraser caused to be driven and herded upon Range Unit No. 19 described in said Exhibit B 182 head of cattle and 32 head of horses, which under the terms of said permit constituted 107 cow units in excess of the number authorized and permitted; that demand was made upon the defendant to pay the penalty agreed to be paid for such overstocking in the sum of $2,693.19; and that defendant has failed and refused to pay said sum or any part thereof.

VI.

That a portion of the foregoing penalties and grazing fees were paid by the forfeiture of a bond posted by defendant R. B. Fraser in connection with Exhibit B and that said defendant should be credited with the sum of $687.51.

Eighth Count

For its eighth count, plaintiff reiterates and restates all that is alleged in paragraph I of the first

count and paragraphs I, II, III and IV of the seventh count, and in addition thereto complains and alleges:

I.

That on or about the 4th day of November, 1954, defendant R. B. Fraser caused to be driven and herded upon Range Unit No. 19, described in said Exhibit B, 196 head of cattle and 17 head of horses, which under the terms of said permit constituted 98 cow units in excess of the number authorized and permitted; that demand was made upon the defendant to pay the penalty agreed to be paid for such overstocking in the sum of $2,466.66; and that defendant has failed and refused to pay said sum of any part thereof.

Ninth Count

For its ninth count, plaintiff reiterates and restates all that is alleged in paragraph I of the first count herein, and paragraphs I, II, III and IV of the seventh count herein, and in addition thereto complains and alleges:

That by the terms of Exhibit B hereto attached and by reference made a part hereof, defendant R. B. Fraser agreed to pay grazing fees set forth in said Exhibit B in advance; that said grazing fees were not paid by defendant R. B. Fraser in advance on September 1, 1954, as required by said Exhibit B and on December 31, 1954, said grazing permit was cancelled by the Bureau of Indian Affairs; that prior to the effective date of said cancella-

tion, the grazing fees for the month of December, 1954, were due and payable in the sum of $114.64, for which demand was made upon said defendant and he has failed and refused to pay said sum or any part thereof.

Wherefore, Plaintiff demands judgment against defendants as follows:

1. For the sum of $2,285.00 as a penalty prescribed by statute for the trespass of livestock grazing on restricted Indian lands, together with interest thereon at the rate of 6% per annum from December 31, 1943.

2. For the sum of $84.00 as a penalty prescribed by statute for the trespass of livestock grazing on restricted Indian lands, together with interest thereon at the rate of 6% from February 13, 1952.

3. For the sum of $42.00 as a penalty prescribed by statute for the trespass of livestock grazing on restricted Indian lands, together with interest thereon at the rate of 6% per annum from January 5, 1955.

4. For the sum of $21.00 as a penalty prescribed by statute for the trespass of livestock grazing on restricted Indian lands, together with interest thereon at the rate of 6% per annum from July 8, 1955.

by statute for the trespass of livestock grazing on re-

5. For the sum of $11.00 as a penalty prescribed

stricted Indian lands, together with interest thereon at the rate of 6% per annum from July 28, 1955.

6. For a temporary injunction against the above-named defendants, and each of them, enjoining them or their agents from driving, drifting, allowing to drift, herding, or conveying any livestock whatsoever, on or upon, or permitting the same to be driven, drifted, or allowed to drift, herded, or conveyed, or pastured, grazed, or fed on or upon any of the lands and premises within the exterior boundaries of the Crow Indian Reservation, or any part thereof, during the pendency of this action, save upon any lands and premises lawfully within the possession of said defendants; and that upon final hearing said injunction be made permanent and perpetual; and that the said defendants be required to show cause, if any they have, why an injunction pendente lite should not be issued to enjoin them or their agents from driving, drifting, allowing to drift, herding, or conveying any livestock whatsoever, on or upon, or permitting the same to be driven, herded, drifted, or allowed to drift, or conveyed, pastured, grazed, or fed, on or upon any of the lands and premises within the exterior boundaries of the Crow Indian Reservation, or any part thereof, or otherwise interfering with the possession, use and enjoyment of said lands and premises by the plaintiff and its Indian wards.

7. For the sum of $2,693.19 as a penalty set forth in the "Range Control Stipulations" attached to Exhibit B, together with interest thereon at the

rate of 6% per annum from May 25, 1954, provided that the sum of $687.51 shall be credited on the foregoing sum as set forth in this Complaint.

8. For the sum of $2,466.66 as a penalty set forth in the "Range Control Stipulations" attached to Exhibit B, together with interest thereon at the rate of 6% per annum from November 4, 1954.

9. For the sum of $114.64 as grazing fees for the year 1954, together with interest thereon at the rate of 6% per annum from December 31, 1954.

10. For such other and further relief as may seem equitable.

KREST CYR,
United States Attorney for the
District of Montana;

/s/ DALE F. GALLES,
Assistant United States Attorney for the District of Montana, Attorneys for Plaintiff.

5-512
Approved by the Secretary of the Interior June 4, 1931
(Revised Nov. 2, 1936. Nov. 14, 1942)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Contract No. I-23- Ind-8615

Execution Fee, $ 18.00

GRAZING PERMIT

WRITE ALL NAMES IN FULL)

COPY

Crow Indian (Agency) Crow Indian (Reservation)

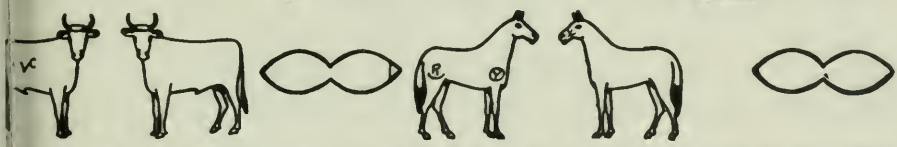
y authority of law and under the regulations (25 CFR 71) prescribed by the Secretary of the Interior, R. B. Fraser (Name of permittee), of 106 Clark Ave., Billings, Montana (Post-office address), is reby granted permission to hold and graze livestock on the Crow servation for a period beginning December 1, 1950, and terminating not later than November 30 55., on range unit No. 19 (Number or name), including all unreserved tribal land as authorized by Crow Tribe and all unfenced Indian allotments on which authority grant grazing privileges have been obtained, a schedule of which is attached hereto and made a part of this permit, and ering livestock in kind and numbers, for the grazing season, and at the rate per head as shown in the following schedule, ject to the payment of all fees and full compliance with the attached range control stipulations which are made a part his permit:

Year	Number of Head	Kind of Stock	Grazing Season From—	Grazing Season To—	Rate Per Head (Season)	Amount	Date Payable One-half	Date Payable One-half
51 to 55 Incl.	83	cattle	yearlong		16.778	1392.61	First annual payment due on or before Dec. 1, 19 Each payment thereafter due September 1 of each year.	

This permit is issued with the understanding that a total of 124 head of cattle will be grazed his unit, the carrying capacity of the privately owned or leased range lands of the unit being 41 head of cattle, evidence of the right to the use of which is recorded with the Superintendent, a schedule of which tached hereto and made a part of this permit. It is further understood and agreed that if the permittee allows a greater ber of livestock than the total number herein stipulated to graze upon this range unit of which the Indian range is a , during the period this permit is in effect, this on-and-off clause shall immediately become null and void and the stock cess of the number upon which fees are paid to the Indians shall be considered as in a state of trespass and treated rdingly. (Delete the above paragraph if not applicable.)

Unless authorized by the Superintendent of the Agency in writing, only livestock bearing the brands and marks herein n shall be grazed under authority of this permit:

CATTLE BRANDED R L | EAR MARK R L | HORSE BRANDS R L | SHEEP BRANDED Wool Brand | EAR MARK R L



a consideration of the above privileges the permittee agrees to pay to the Superintendent for the use and benefit of dians entitled to occupy the lands above described, the sum of money found to be due from the permittee according provisions of this permit (calves, colts, and lambs under 6 months of age not to be counted), and the permittee further s to pay the grazing fees annually or semiannually in advance. Unless the grazing fees shall be paid in advance for ll term of the permit, these payments will be guaranteed by an acceptable bond as required by the regulations (25 71.17) or any amendments thereto (with a maximum of $25,000).

is understood and agreed by the permittee that this permit is terminable and revocable in the discretion of the Com- ner of Indian Affairs after 30 days' written notice.

Exhibit B

16—63540-4

page 1

13

It is also understood and agreed that any part of the area covered by this permit may be excluded from this range unit the Commissioner of Indian Affairs in the exercise of his discretion, or by the transfer of title through sale of allotted d, or by the extinguishment of the Indian right of occupancy of the lands; and thereupon this permit shall cease and ermine as to the parts of the range unit thus eliminated, the number of stock stipulated shall be reduced in conformity reto, and the payments due hereunder shall be adjusted accordingly, provided that the termination of this permit has not n due to the fault of the permittee or to a violation of the terms of this permit by or on behalf of the permittee.

The permittee hereby agrees that he and his employees will not use any part of the range unit for the sale, manufacture, rage, or drinking of intoxicants or the handling of narcotics, and neither he nor his employees will take part in immor- y or any illegal practices whatever in or upon the reservation. Violation of this clause will be deemed sufficient ground cancellation of this permit.

All livestock grazed under this permit and all other property used in connection with this permit shall be held as security the payment of any grazing fees due and for the full performance of the agreement, and all payments due hereunder ll constitute a prior and first lien upon said livestock and other property incidental to the enjoyment of the privileges ated. The Agency office contains public records of the United States pertaining to trust Indian allotments and all per- s are charged with notice and knowledge thereof. A copy of each permit must be filed promptly in the Agency Office. h copy shall be available at all times for public inspection. If the permittee so desires he may file or record a copy of permit, at his own expense, in the proper county office.

The permittee hereby agrees to perform the range conservation practices and to construct the range improvements on Indian lands in proportion to the practices performed and improvements constructed on the non-Indian lands used in nection with the unit insofar as practicable if the unit is entered in the Agricultural Conservation Program, and to prepare future proposed programs during the life of this permit to accomplish this purpose; and the permittee further agrees to in permission on the proper form for construction on the Indian lands of the improvements involved in the program.

This permit shall not be assigned, sublet, or transferred without the written consent of the parties thereto and the ty.

The Superintendent and the Regional Forester shall make decisions relative to the interpretation of the terms of this mit and the range control stipulations which are attached hereto, and the terms of this permit cannot be varied in any ll except as herein provided without the written approval of the parties thereto and the surety.

No Member of, or Delegate to Congress, or Resident Commissioner shall be admitted to any share or part of this permit, any benefit that may arise therefrom, but this provision shall not be construed to extend to this permit if made with rporation or company for its general benefit.

Concurrence by the Regional Forester is necessary to make this permit effective, when required by the regulations CFR 71.16).

Issued at the Crow Indian Agency this 17th day

November, 19 50

L. C. Lippert, /s/ L. C. Lippert [SEAL]
(Superintendent)

I accept the permit with the foregoing conditions and the attached range control stipulations.

ess /s/ Clark McCarry

ess /s/ L. E. Groh R. B. Fraser /s/ R. B. Fraser [SEAL]
(Permittee)

Carred in DEC 20 1950, 19

omas L. Carter, /s/ Thomas L. Carter
Regional Forester.

U. S. GOVERNMENT PRINTING OFFICE 16—38548-1

Copy

Land Schedule

Unit No. 19
R. B. Fraser
Page No. 1

Al. No.	Name	Land Description	Acres	Rate	Ann. Fees
353B	Bigmountain	NW¼, W½NE¼ Sec. 35-1-27	200.0	.44	$ 88.00
1803	Shoots Pretty Things Oldtail	Lots 5, 8, E½SE¼ Sec. 21; Lot 1, NE¼NE¼, N½SE¼NE¼ Sec. 28; SW¼SW¼ Sec. 22-1-27	302.38		133.05
1811	Behind	SE¼SW¼ Sec. 36-1-27	40.0		17.60
1817	Knows His Horse	E½, E½W½, E½E½W½W½ Sec. 26; W½W½W½W½, Sec. 25; NE¼NE¼ Sec. 35-1-27	600.0		264.00
1879	Finds His Enemies Forehead	N½, E½SW¼, SE¼ Sec. 27; W½W½W½, W½E½W½W½ Sec. 26-1-27	640.0		281.60
1881	Jessie Forehead	SE¼SE¼ Sec. 35-1-27	40.0		17.60
1921	Muskrat Goes In The Hole	SE¼NE¼ Sec. 35-1-27	40.0		17.60
2097	Shuts Her Eye Among Enemy	Lots 4, 5, S½SE¼NE¼; Lot 9 E½SE¼ Sec. 28; W½SW¼, Sec. 27; Lot 1, E½NE¼ Sec. 33; NW¼, NE¼ Sec. 34-1-27	742.64		326.76
2176	Takes Two Lances	NE¼SE¼ Sec. 35-1-27	40.0		17.60
2179	Rides Among Them	SW¼SW¼ Sec. 36-1-27	40.0		17.60
2738	George Costa	NW¼ Sec. 22-1-27	160.0		70.40

Exhibit B—(Continued)

Al. No.	Name	Land Description	Acres	Rate	Ann. Fees
2739	Pearl Elizabeth Costa	NE¼ Sec. 22-1-27	160.0		70.40
2740	Lewis Allen Costa	N½SW¼, SE¼SW¼, NW¼SE¼ Sec. 22-1-27	160.0		70.40
		Total Acres and Fees	3,165.02		$1,392.61

On-and-Off Schedule

Unit No. 19
R. B. Fraser
Page No. 1

Al. No.	Name	Land Description	Acreage
1808	Susie Bear That Walks	E½SE¼ Sec. 33; S½ Sec. 34; S½SW¼, SW¼SE¼ Sec. 35-1-27; Lots 1, 2, 3, Sec. 2-2-27	638.49
2177	Mary Bigmountain	N½SW¼, NW¼SE¼ Sec. 35-1-27	120.0
3430	Dorothy Oldtail	S½S½S½S½ Sec. 14; All Sec. 23; E½SE¼, SW¼SE¼ Sec. 22-1-27	800.0
	Deeded	Lot 3, SE¼SE¼ Sec. 15-1-27	78.44
		Total	1,636.93

Recapitulation of On-and-Off Lands:
Allotted land 1,558.49
Deeded land 78.44

United States
Department of the Interior
Bureau of Indian Affairs

Range Control Stipulations

1. Grazing Permits

Grazing permits on Indian reservations are issued subject to certain restrictions and regulations, and with the distinct understanding that the ranges will be reduced both in size and carrying capacity whenever the Commissioner of Indian Affairs shall consider such action essential to the protection of the interests of the Indians. Grazing permits cover Indian lands only, inclusive of unalloted land not otherwise disposed of and all unfenced allotments on which powers of attorney have been executed to the superintendent authorizing him to act for the allottees. Permits must be executed within thirty days after the receipt of notification of an award.

2. Payment of Grazing Fees

Grazing fees shall be paid annually or semiannually in advance, as specified in the permit. No charge will be made for animals under six months of age at the time of entering the reservation, which are the natural increase of the stock upon which fees are paid. Payment will be made for calves, colts, and lambs over six months old for the time grazed on the reservation after that age is reached at the same rate as for full grown stock.

3. Excess or Deficit of the Number of Stock Speci fied

Unless the number of livestock specified in th permit is reduced by the Commissioner of India Affairs, the permittee will not be allowed credit o rebate in case the full number is not grazed on th area. However, if the number authorized is exceeded without previous authority, the permittee will b required to pay in addition to the regular charge as provided in the permit, a penalty equal to 50 pe cent thereof for such excess stock and the stock wil be held until full settlement has been made.

4. Crossing Permits

Livestock shall not be driven upon or across an reservation without first securing a standard forn crossing permit No. 5-929 properly signed by a authorized official of the Indian Service. This per mit will state the number of head, dates of trave class of stock, trail to be used, and destination. Suc stock must be moved not less than 5 miles in cas of sheep and 10 miles in case of cattle each day, an stock shall not remain more than 12 hours at an bed ground or camping place. In case of unnecessar delay, or wilful trespass, the superintendent or hi authorized agent shall assess and collect such dam ages as may seem reasonable. Owners of stock wil anticipate their time of entry and secure a permi well in advance of the date when the stock will ente upon the reservation. All stock will be refused entr upon the reservation until a permit to enter has bee

issued. The agency office and the officer in charge must be notified at least 5 days in advance in order that arrangements may be made for an official to meet the stock. Stock owners who introduce their stock upon the reservation without proper authority will be considered as trespassers and their stock will be removed from the reservation and denied the right to return. The right is hereby reserved to issue crossing permits over all ranges, regardless of whether or not special driveways have been established thereover, and provided that the movement of stock so authorized shall be effected under the supervision of the superintendent or his agent. A permittee will not authorize another permittee to drive stock across his range.

5. Quarantine Regulations

All stock covered by permit is subject to the quarantine laws and regulations now in force or hereafter to be promulgated by the United States and the State in which the reservations are situated.

6. Law and Order

All regulations relative to the maintenance of law and order on Indian reservations and those forbidding the introduction of intoxicating liquors will be complied with by the permittee and his employees.

7. Entering the Range

The earliest date upon which stock will be permitted to enter the range will be the date shown in the permit. Notice must be given to the superintend-

ent prior to entering the reservation. On reservations where permanent driveways have been established all livestock will be required to enter or leave the reservation on the particular driveway designated by the superintendent. On reservations where driveways have not been established and roads and trails are used for the movement of livestock, the route to be followed will be the most practicable one available and will be designated by the superintendent.

8. Counting of Livestock

All livestock grazing upon or crossing Indian reservations must be counted by an authorized officer of the Indian Service. Arrangements should be made for counting all livestock before it enters the reservation. Permittees are required to notify the superintendent a sufficient length of time in advance to permit him to have a representative present when stock are counted on or off the reservation. The right is reserved by the Indian Service to have a representative present at each roundup to check the number of stock, and in the event that the permittee shall fail or refuse to roundup his stock at proper times and in a satisfactory manner for the purpose of allowing a count of the stock, the superintendent shall have the right to roundup and count said stock at the expense of the permittee.

9. Branding of Stock

All livestock grazed under permit on Indian reservations or livestock which is authorized to cross

said reservations under formal crossing permit must be branded so as to be identified. The brands of all livestock grazed upon the reservation under permit must be recorded in the office of the superintendent with the owner's name.

10. Affidavit of Permittee

If grazing permits are issued for a period exceeding one year, the permittee will be required to execute (or have executed by a competent foreman) an affidavit showing the number of livestock grazed under authority of such permit and on hand at the close of June of each year, and, in case of occupancy of the area during the previous winter, the number carried over, if any; and another affidavit at the close of December of each year showing the livestock then on hand and the number carried during the summer of that year, or such period as may be required by the Commissioner of Indian Affairs. Affidavits should be made on standard form 5-370.

11. Camp Record

A camp record showing the number of each camp, approximate number of days of feed available, dates used, and losses from predatory animals, etc., will be required in connection with all sheep grazing permits. Reports should be made by the permittee at the close of each grazing season on standard form 5-518. A record should also be made of all predatory animals killed on the range unit by the permittee and his employees and a report made to the superin-

tendent. In States where bears are protected by law only such bears may be killed as are actually killing or attempting to kill livestock.

12. Camp Fires

Camp fires must not be built against logs, stumps, or trees. The ground around the fire must be cleared of all inflammable material to at least a distance of 6 feet on all sides. The fire itself must be built in a hole cut at least 10 inches into the mineral earth. The camp fire must be completely put out with water or mineral earth whenever the camp is left alone even for a short time. It is suggested that stoves be used in camp whenever possible, in order to decrease the fire hazard. Each camp outfit must include a shovel and an ax, each in good condition.

13. Smudge Fires

Smudge fires must not be made unless absolutely necessary. They must never be made in places which have not been fully cleared for a distance of 25 feet on all sides. A smudge fire must never be made near the roots of a tree, in or near a stump or snag, and must be close to and in plain sight of camp. Such fires, when not serving the purpose for which they are made and when the camp is deserted or moved, must be immediately and completely extinguished with water or by burying with mineral earth.

14. Conduct in Case of Fire

Whenever a permittee discovers an unauthorized and uncontrolled fire burning, whether started by

his own carelessness or in some other way, he should put it out if he can. If it cannot be put out or placed under temporary control, it should be reported to the nearest forest or grazing officer as soon as possible. In case of fire all range users are expected to place themselves and their employees at the service of the forest or grazing officer in charge for such work in connection with the fire as the officer may request. The failure of any permittee to co-operate to the fullest extent possible in the control of forest and range fires may result in the immediate cancellation of any permits which he may hold and his removal from the reservation. The unauthorized setting of a fire or carelessness in connection with an authorized fire may result in criminal prosecution under Section 6 of the act of June 25, 1910 (36 Stat. L., 855-857).

15. Trespass

All permittees must avoid trespassing. In case of trespass the herder and packer may be excluded from the reservation. The owner is liable to prosecution for civil damages. When upon the reservation the herder, packer, and camp mover must understand that should the instructions of their employer and the forest or grazing officer disagree as to the manner in which the range should be used, they must follow the instructions of the officer. Ordinarily the grazing movements of stock of a permittee within the range assigned him will not be interfered with, but the superintendent reserves the

right to direct such movement whenever he deems it necessary for the proper protection and utilization of the range. The following acts constitute trespass:

(a) The grazing upon or the driving of any stock across the reservation without a written permit, or the grazing upon or the driving across any reservation in violation of the terms of a permit.

(b) The grazing of stock upon Indian land within an area closed to grazing of that kind of stock.

(c) The grazing of stock by a permittee or lessee upon an area withdrawn from use for grazing purposes.

(d) Allowing stock to drift and graze upon the reservation without a written permit.

(e) Violation of any of the terms of the grazing permit or crossing permit.

(f) Refusal to move stock upon instructions of an authorized officer of the Indian Service when an injury is being done to the range or forest by reason of improper handling of the stock.

16. Damage to Roads, Trails, or Springs

Any person or persons to whom grazing permits or crossing permits have been issued receive such permits with the understanding that they are obligated to repair all damage to roads or trails caused

by the presence of their stock in any part of the reservation. Permittees must build any new roads, trails, or bridges found necessary for the proper handling of their stock. They must also fence any springs or seeps on Indian land which are being damaged by the trampling of their stock, if they shall be ordered to do so by the superintendent or his duly authorized representative.

17. Damage to Indian Property

The permittee will exercise due precaution to prevent injury to the premises or livestock of Indians and will be required to return to the vicinity of any Indian's home any livestock belonging to such Indian which may have strayed through the handling of stock under this permit or drifted away with the permittee's herd. The permittee will be required to reimburse the Indians for any damage that may be done to their premises or livestock through the acts of the permittee, his employees, or livestock.

18. Bedding Sheep

The bedding ground must be changed every day unless some natural condition will not allow the change to be made. Where possible the bedding out system will be used. Except where camp wagons are used no bed ground will be occupied for more than two night, and where camp wagons are being used three nights will be the maximum time allowed. Failure to observe these rules will result in that part of the range being withdrawn from the grazing area

and possible removal of the stock from the reservation. The trailing of sheep into and out from a permanent bed ground will not be allowed. Bed grounds where possible will be located at least one-quarter of a mile from a running stream, spring, or other water.

19. Disposition of Carcasses

The carcasses of all animals which die upon the reservation from contagious or infectious diseases must be burned at once, and the carcasses of all animals which die close to water, trails, or other places where they will be a nuisance must be removed immediately and buried or burned. The same extreme care should be taken when building or putting out a fire for burning a carcass as in case of a fire for any other purpose.

20. Salting of Stock

When the forest or grazing officers shall require it all stock grazed under permit must be salted regularly at such places and in such manner as may be designated. This rule applies more particularly to cattle but on some ranges may also apply to sheep. The use of troughs is advocated and these should be placed on rocky ground and well removed from water. Under no conditions will salt be placed at or near water. The proper use of salt on all ranges should aid in preventing stock from remaining too long at watering places and thereby permanently damaging the feed. Stock will alternate between salt

and water if the two are widely separated and will consume as much range around a salt ground as around a water hole.

21. Handling of Sheep

The open-herding system of handling sheep should be used on all ranges where applicable. The principal points in this system are:

(a) Herding in the lead of sheep instead of in the rear, and training them to spread out and graze quietly.

(b) Grazing rather than driving when going to and from water.

(c) Bedding down the sheep on fresh bed grounds where night overtakes them, with proper selection of bed grounds so the sheep will be contented.

(d) Camping close to the sheep each night by using a burro or horse to pack the herder's food and bed, or packing the herder's outfit with a saddle horse from a central camp.

(e) Using dogs as little as possible after the sheep are properly trained and keeping dogs principally to protect the flock from predatory animals.

(f) Ewes with lambs will invariably graze around the bed ground before leaving. For this reason ewes and lambs should never be camped twice in the same place, if avoidable.

22. Protection of Game, Fish, and Birds

It is expected that herders and other employees will comply with the game laws of the State in which the reservation is located and will assist the forest, grazing, and State officers in the enforcement thereof, and they will be required to comply with all regulations of the Indian Service regarding fish and game.

23. Range Improvements

It is the policy of the Service to encourage the construction of improvements necessary for the proper management of livestock and the utilization of the range. Proper range improvements will make available much feed which could not otherwise be utilized. However, the cost of such improvements will be borne by the permittee unless otherwise provided for in the permit.

24. Condition of Camping Ground

Camp grounds must be kept in a clean and sanitary condition. All rubbish, tin cans, etc., must be properly burned or buried during occupancy or upon removal to new sites.

25. General Conduct

These stipulations have been made for the assistance and guidance of permittees and become a part of their grazing permits. If faithfully carried out they will promote the best interests of all concerned. This fact should be recognized by livestock owners and a spirit of hearty co-operation maintained. The

Service desires permittees who will work with the forest and grazing officers. Those who comply with the stipulations will be given every reasonable consideration consistent with good business management, while those who disregard them will be denied the privilege of further grazing upon Indian reservations.

26. Applicability of Stipulations.

The above range control stipulations are hereby prescribed for use in all grazing permits except as special provision shall be made by the Commissioner of Indian Affairs.

27. Interpretation of Stipulations

The final interpretation of these stipulations shall rest with the Secretary of the Interior.

DEPARTMENT OF THE INTERIOR,
Office of Indian Affairs,
Washington.

Approved: May 29, 1931.

C. J. RHOADS,
Commissioner.

DEPARTMENT OF THE INTERIOR,
Office of the Secretary,
Washington.

Approved: June 4, 1931.

JOS. M. DIXON,
First Assistant Secretary.

EXHIBIT B

(Copy)

Range Unit No. 19.
Contract No. I-23-ind-8615.

Additional Stipulations
Grazing Permit

The permittee hereby agrees to perform reasonable maintenance of range improvements on the range unit in a manner acceptable to the Superintendent or his duly authorized representative.

It is understood and agreed that allowance will be made for the grazing of Indian owned livestock on the range unit covered by this permit. In the event it is necessary for Indian owned livestock to be grazed in the unit, proper adjustment will be made on the maximum number of livestock authorized and in the payment of fees.

It is understood and agreed that the area described in the land schedule attached to and made a part of the permit shall be increased by the addition of non-competent allotments within the range unit boundaries upon which authorities to grant grazing privileges are obtained at any time during the contract period, and by the addition of allotments of non-competent minor Indians who reach their majority during the period that this permit is in force and whose allotments are now under leases executed by their competent parents, provided such minor Indians then execute authorities

to grant grazing privileges on their allotments, in which event the number of livestock to be grazed and the amount of grazing fees shall be increased proportionately to the increased area of the unit.

Movable range improvements, including fences, placed upon the range unit described in the permit by the permittee may be removed from said unit not later than 30 days after the termination of the permit.

The permittee is strictly prohibited from moving or removing any existing range fence or constructing any new fence on the unit without the written approval of the Superintendent.

It is hereby understood and agreed by and between the parties hereto that the additional stipulations contained herein shall be and are attached to and made a part of the certain grazing permit contract above referred to.

/s/ R. B. FRASER,
R. B. FRASER,
Permittee.

Approved: Dec. 18, 1950.

/s/ L. C. LIPPERT,
L. C. LIPPERT,
Superintendent.

Concurred in Dec. 20, 1950.

/s/ THOMAS L. CARTER,
THOMAS L. CARTER,
Regional Forester.

EXHIBIT C

United States
Department of the Interior
Bureau of Indian Affairs

12/3/54

Modification No.

MODIFICATION OF GRAZING PERMIT

(Copy)

Range Unit No. 19. Crow Agenc
Contract No. I-23-ind-8615. Crow Reservatio
Permittee: R. B. Fraser. Date of Permit: November 17, 195

By authority of law and under the regulations (25 CFR 71), and as ma hereafter be amended, the above-cited grazing permit, as previously mod fied by Modifications Nos. none, is hereby modified to include or exclu the lands on which fees are paid, or those under the on-and-off clause, d scribed in detail on the attached schedule, which is made a part hereof; an to increase or decrease the number of livestock in accordance with th carrying capacity of the lands, and to change the terms of the permit a indicated below:

Area of Tribal Land	from None	to	None	acre
Area of Allotted Land (fees paid)	from 3,165.02	to	3,125.02	acre
Area of Allottee Use Land	from None	to	None	acre
Area of Govt.-owned Land	from None	to	None	acre
Total	from 3,165.02	to	3,125.02	acre
Area of Private Land	from 78.44	to	78.44	acre
Area of Leased Land	from 1,558.49	to	1,558.49	acre
Total On-and-Off	from 1,636.93	to	1,636.93	acre
No. Stock Under Permit—Cattle (exclusive of On-&-Off) (C. H. S.)	from 83	to	82 yearlong hea	
No. Stock Under On-&-Off—Cattle (C. H. S.)	from 41	to	41 yearlong hea	
Total Number Stock—Cattle (C. H. S.)	from 124	to	123 yearlong hea	
Annual Grazing Fees	from $1,392.61	to	$1,375.01	
Cash Bond	from $ 196.31	to	$ 187.51	

Withdrawal from the Land Schedule:
Al. 2179—Rides Among Them—SW¼SW¼ Sec. 36-1-27—40 Acres @ 44
$17.60 Annual fees. Fee Patent issued to Albert Vermandel.

This modification becomes effective December 1, 1951, and does not change any of the terms, conditions, or stipulations of the permit, except as specifically set forth herein.

In witness whereof the said permittee has hereunto set his hand and seal this 23 day of Feb., 1952.

/s/ R. B. FRASER,
(Permittee.)

Witnesses:

/s/ CLARK McGARRY.

/s/ E. M. WILSON.

[Endorsed]: Filed December 24, 1955.

[Title of District Court and Cause.]

MOTION

Comes now the defendant, R. B. Fraser, in the above-entitled action, for himself alone, and not for the remaining defendants, by and through the undersigned, his attorney, and moves the court to dismiss (a) the Seventh Count, (b) the Eighth Count, and (c) the Ninth Count, in plaintiff's complaint, in that each of said counts in said complaint fails to state a claim against the said defendant upon which relief can be granted.

Dated this 12th day of January, 1956.

/s/ STERLING M. WOOD,
Attorney for Defendant.

Service of copy acknowledged.

[Endorsed]: Filed January 13, 1956.

[Title of District Court and Cause.]

MOTION FOR PRELIMINARY INJUNCTION

Comes Now the plaintiff by and through its undersigned attorneys of record and moves the Court for a preliminary injunction in the above-entitled cause enjoining the defendants, R. B. Frazer, R. B. Fraser, Inc., a corporation, and Charles Fraser, also known as Chas. Fraser, their agents, servants, employees and attorneys from driving, drifting, allowing to drift, herding, or conveying any livestock on or upon, or permitting the same to be driven, drifted, allowed to drift, herded or conveyed, or pastured, grazed, or fed on or upon any of the lands and premises within the exterior boundaries of the Crow Indian Reservation, or any part thereof, during the pendency of this action, save upon any lands and premises lawfully within the possession of said defendants.

The grounds upon which this motion is made and based are set forth in the Complaint filed herein, and the affidavits of Gordon I. Powers, Clark C. Stanton, Orie E. Dosdall, Joe A. Cormier, Clem R. Cormier, Wm. G. Cheney, and the joint affidavit of Joseph B. Mast, Urban Landon and Dale J. Buxton, copies of which are attached hereto and made a part hereof.

That unless said defendants are restrained pending the final determination of this proceeding or until further order of this Court, the alleged trespasses and threats of future trespasses will ir-

reparably injure the plaintiff and the lands over which it has jurisdiction. The plaintiff has no other adequate remedy at law.

Dated this 2nd day of May, 1956.

KREST CYR,
United States Attorney for the
District of Montana;

/s/ DALE F. GALLES,
Assistant United States Attorney for the District of Montana, Attorneys for Plaintiff.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Yellowstone—ss.

Gordon I. Powers, being first duly sworn, on oath says:

I am and have been for seven and one-half years continuously last past an employee of the United States Bureau of Indian Affairs with my post of duty at Crow Agency, Montana, and have been during that time charged with the responsibility and authority to supervise and inspect the use of Indian grazing land, including suspected trespasses and other violations of the laws and regulations covering grazing operations on restricted land of

the Crow Indian Reservation. At the times hereinafter stated I personally observed the following facts:

Unit 22 Trespass, January 31, 1952

In response to a complaint from Mr. Joe Cormier made on January 30, 1952, I made a range count on January 31, 1952, of livestock grazing in trespass on non-competent land in range unit No. 22 permitted to Clem R. and Joe A. Cormier.

I entered the range unit No. 22 at 8:15 a.m., and met Joe and Clem Cormier who were on horseback. Both of the Cormier brothers told me that they had no cattle in range unit No. 22 at this time. I proceeded along in my Jeep and the Cormier brothers remained on horseback.

I identified the location of non-competent allotments Nos. 2505 and 2003. I counted 27 cattle branded [1]* right ribs grazing in trespass on Al. 2505, Lion That Walks—SW¼ Sec. 33-3-27, and 28 cattle branded [1] right ribs or [2] right ribs grazing in trespass on non-competent Al. 2003, Her Horse Is Pretty Hunts to Die—Lots 2, 3, Sec. 31-3-26.

The brand [1] right ribs is recorded in the name of R. B. Fraser. The Cormier brothers told me that the brand [2] belonged to Bill Linderman of Red Lodge, Montana. All cattle grazing in this area were branded with one or the other of these two brands.

I left the cattle undisturbed. As I was leaving the area in which I counted the cattle and while I was still on non-competent permitted land, I met a man who said his name was Roy McGarry and who was driving a truck which I had often seen in the Fraser livestock operations. He told me that he worked for Mr. R. B. Fraser and was in charge of the cattle I had just counted, including the cattle branded [2] R.R. I pointed out to him the general location of the land that was permitted to the Cormier Brothers. He told me that he had been herding these cattle to the southwest of this permitted area on Mr. Fraser's competent leased land and that the cattle had recently been wandering since the snow had melted off and he was letting them go where they wanted to go. He also said that he had advised Mr. Fraser of this. He said he was planning to see Mr. Fraser that night so I asked him to advise Mr. Fraser that I had counted 55 of his cattle in trespass and that I was going to write a letter to notify him of the situation.

I then left Mr. McGarry and returned to Crow Agency.

Trespass in Range Unit No. 22, February 4, 1952

I made a range count of livestock grazing in range Unit No. 22 on February 4, 1952. I located the non-competent land permitted to the Cormier Brothers in range unit No. 22 and counted 73 cows branded [1] RR or [2] RR grazing in trespass on non-competent Allt. 2505, Lion That Walks—SW¼ Sec.

33-3-27. The brand [1] RR is recorded in the name of R. B. Fraser. I also counted 136 steers with tails bobbed, no brand identifiable, grazing on the above non-competent permitted land.

I met a man named Robert Wahls feeding cake to the cattle. He said he worked for the Cormier Brothers and that the steers belonged to the Cormier Brothers. He said that these steers had been turned onto range unit No. 22 on February 2, 1952. Mr. Roy McGarry arrived and unloaded a horse from his truck, which was the same Fraser truck mentioned above. He told me that these cows belonged to Bob Fraser and that he had moved them to Fraser's competent leased land after he had talked to me on January 31, 1952, but they had drifted back to where they were grazing on this date after the Cormier steers were put onto unit 22. Mr. McGarry told me that he intended to move the cows out again and he and an Indian cowboy were gathering the cows when I left range unit No. 22.

I stopped at the Cormier Ranch on Pryor Creek and talked to Clem Cormier. He told me that he had moved about 160 steers onto range unit No. 22 on February 2, 1952.

I then returned to Crow Agency.

Trespass in Range Unit No. 22, February 13, 1952

In response to a complaint from Joe A. Cormier, permittee on range unit No. 22, made on February 12, 1952, I made a range count on range unit No. 22

on February 13, 1952. On the morning of February 13, 1952, I met Clem R. Cormier and Almon Hall, State Livestock Inspector, at the Cormier Ranch on Pryor Creek. We drove into range unit No. 22 where we met Joe Cormier and Albert Newman, a Cormier cowboy, who were on horseback. At this moment Mr. Roy McGarry drove up and we asked him to ride with us taking a livestock count. I asked Mr. McGarry if all the cows in the area were branded [1] right ribs and he said that they were and that there were also three steers in the herd with the same brand. I asked him whose name the brand was recorded under and he said it was either R. B. Fraser or R. B. Fraser, Inc. Mr. Hall, the Livestock Inspector, said the brand belonged to R. B. Fraser. Since Mr. McGarry said the cows were branded [1] right ribs and belonged to Mr. Fraser and because Clem Cormier said that he had only steers in range unit No. 22 I told Clem Cormier, Mr. Hall and Mr. McGarry that I did not need to disturb the cattle and identify every brand but would count the cows knowing that they belonged to Mr. Fraser. I identified the non-competent land under permit to the Cormier Brothers and counted 82 cows and 2 steers grazing in trespass as follows:

49 cows on non-competent allotment No. 1841—Shows Going Takes Gun—N½SE¼ Sec. 33-3-26.

33 cows and 2 steers on non-competent allotment No. Al. 2610, Medicine Wolf—Lot 2, Sec. 4-4-26.

The two steers were rebranded [2] right ribs. Clem Cormier told me that the brand [2] right ribs belonged to Bill Linderman, Red Lodge, Montana. We then left the cattle undisturbed, dropping Mr. McGarry off at his truck inside the boundary of Range unit No. 22 and returned to the Cormier Ranch on Pryor Creek. We had lunch at the Cormier Ranch and I then returned to Crow Agency.

The man named Roy McGarry and referred to above is the same person whom I have seen in and about the cattle operations in charge of Charles W. Fraser on the Pryor area of the Crow Reservation. At the time stated above he was driving a truck which I had often seen at and about the livestock or grazing headquarters in charge of Charles W. Fraser.

Overstocking Range Unit No. 19, November 4, 1954

On November 4, 1954, Mr. C. R. Pilgeram, Range Management Assistant, and I made a range count of livestock grazing in range unit No. 19 permitted to Mr. R. B. Fraser.

I counted a total of 196 cattle, 95 calves and 17 horses grazing within the exterior boundaries of range unit No. 19. These cattle were branded [1] RR, [3] LR, and [4] LS. The brand [1] RR is recorded in the name of R. B. Fraser. The brands [3] LR and [4] LS are recorded in the name of R. B. Fraser, Inc. The horses were too wild to approach close enough to identify brands.

Mr. Pilgeram and I then left range unit No. 19 and drove to Billings. I visited the Billings Area Office and reported this range count to Mr. Thomas L. Carter, Area Land Operations Officer. We determined that the present stocking of range unit No. 19 equaled 221 cow units exclusive of calves, at the conversion rate of 2 horses to 3 cows, which equals 25 cow units plus 196 cattle, making a total of 221 cow units. Range unit No. 19 was overstocked by 98 cow units, only 123 cow units being authorized under Mr. Fraser's grazing permit on Range Unit No. 19.

Mr. Pilgeram and I then returned to Crow Agency.

Trespass on Range Unit No. 19, January 5, 1955

On January 5, 1955, I made a range count within the boundaries of range unit No. 19 to determine whether Mr. R. B. Fraser had removed his livestock from non-competent land that had been permitted to Mr. R. B. Fraser prior to cancellation of his grazing permit on range unit No. 19, the effective date of cancellation being December 31, 1954.

I entered the range unit by Jeep about 10:00 a.m. I counted 20 horses grazing in trespass on non-competent land that I identified as being Allt. 1803, Shoots Pretty Things Oldtail—NE¼SE¼ Sec. 27-1-27.

The horses were wild and I could not approach closely enough to distinguish any brands. I counted 42 cattle grazing in trespass on non-competent land

that I identified as Allot. 1879, Finds His Enemies Forehead—N½ Sec. 27-1-27.

As I was approaching the cattle from the west I observed a horseman about ½ mile distant riding away from the cattle in an easterly direction. I did not attempt to overtake him. I watched him ride off the rims to the east towards Fraser's camp. He was riding a small sorrel horse with four white stockings and a white blaze on the face. I was using binoculars.

Most of the cattle were horned 2-year-old heifers and they looked to me like they could be registered stock. I could not detect any brands because of the long hair. There were no ear marks or ear tags visible.

I observed numerous recent bed grounds which indicated that the cattle had been bedding in this area for the past several days.

I drove on to a gate at the east unit boundary at the section corner of Sections 25, 26, 35 and 36, T 1 S., R. 26 E. As I opened the gate I saw a light-colored pickup truck approaching from the direction of Fraser's camp about ¾ mile distant. I waited at the gate to see if the man in the pickup wanted to talk to me. There were two men in the pickup, neither of them familiar to me, and they drove on by me, passing about 100 yards away, and disappeared over the ridge headed in the direction from which I had just come.

I left range unit No. 19 and proceeded across a stubble field towards Pryor Creek Road when I saw the same pickup truck returning along the trail headed back towards the Fraser camp.

I drove up the Pryor Creek Road past the Fraser camp located on the southeast side of the highway on non-competent Allot. 1881, Jessie Forehead—SE¼SE¼, Sec. 35-1-27. As I drove by the camp I recognized the rider talking to the two men in the light-colored pickup and one other man. The rider pointed towards me as I drove by. I also recognized the sorrel horse standing alone in a corral near the road.

The land on which this camp is located was part of the non-competent land included in the grazing permit held by Mr. Fraser prior to the cancellation of the permit effective December 31, 1954. Mr. Fraser had no lease or permit on this tract of land on January 5, 1955.

I proceeded on up the Pryor Creek Road and onto Sage Creek where I conducted a range inspection of that area and then returned to Crow Agency arriving at 5:45 p.m.

The following day, on January 6, 1955, Mr. Clark Stanton, Range Conservationist, and I visited the Fraser camp on Pryor Creek on Allot. 1881, Jessie Forehead, at about 5:45 p.m. We were invited into the kitchen of the living quarters and we introduced ourselves to two men and a woman who gave their names as Mr. and Mrs. Boardman and Mr. Rags-

dale. I told them I was from the Crow Agency Office and asked if they could tell me who owned the cattle in the pasture across the road, a part of range unit No. 19. Both men stated that the cattle were Fraser's, most of them Bob's but they thought Charlie Fraser owned some of them. I asked them if they worked for Bob Fraser and they both answered yes, that they had been working for him since some time in November, 1954. I asked them if the cattle were branded and they both said yes, that Bob's brand was [4] on the left shoulder but neither men knew what Charlie Fraser's brand was. I asked them if the heifers were registered and they said yes, most of them were. I asked them which of them was the man that I had seen riding away from the cattle yesterday and Mr. Boardman, who said his first name was Karl, answered that he was the rider and he had seen me just before he rode down off the rims. He said he had been looking through the cattle for a calf that was missing. Mr. Boardman said there should be 46 cattle and 22 horses in the pasture. I told him this pasture was known as range unit No. 19 and that Mr. Fraser's grazing permit on the range unit had been cancelled December 31, 1954, and that the cattle were in trespass.

I asked them if they had to drive the cattle up the draw where I had seen them grazing or if they just drifted up there. They both stated that the cattle had been coming down to water in the ditch and Pryor Creek near the camp and drifting back by

themselves for quite awhile. Mr. Boardman repeated that they did not have to drive the cattle, that they drifted back by themselves.

I asked them if the reservoir on Bob Fraser's land to the south of the rims and south of where the cattle were grazing was frozen over. They both said that it was frozen over but they had opened up a hole occasionally. I asked if these were the only cattle in the pasture and they both agreed that this was the only herd in the pasture at this time. I did not tell them to remove the cattle. I told them I would see Charlie Fraser or Bob Fraser about the matter. I thanked them for their co-operation and Mr. Stanton and I returned to Crow Agency, arriving at 7:10 p.m.

Trespass in Range Unit No. 19, July 8, 1955

In response to a complaint from both Clem R. and Joe A. Cormier, permittees of range unit No. 19, I made a range count of horses grazing in range unit No. 19 on July 8, 1955, arriving at the northwest boundary at 7:45.

I mounted a horse that had been left for me inside of the fence on the unit boundary and rode into the unit to locate the Cormier brothers who had entered the range unit ahead of me.

When I reached a high bench in the northwest corner of unit No. 19, I observed a herd of horses followed by several riders approaching from the southeast about 1½ miles distant. I rode to meet

them and helped herd 3 mules and 18 horses to a fence corner on non-competent allotment No. 1803, Shoots Pretty Things Oldtail, Lot 5, Sec. 21, T. 1 S., R. 27 E., where Joe Cormier, Clem Cormier, Pat Cormier and a cowboy named George held the herd while I identified the brands. The following identification was made with the assistance of the above-named cowboys:

2 mules branded [3] right shoulder.
1 mule branded [5] left jaw.
1 sorrel gelding and 1 bay mare branded [6] left hip.
1 sorrel gelding branded [7] left hip ("boot brand").
1 chestnut, 1 sorrel piebald, 2 sorrels with stars on their faces, 1 brown, 1 light palomino and 1 golden palomino, all geldings and 1 brown mare branded [5] left jaw.
1 bay gelding branded CBC left thigh.
1 brown gelding branded 6-H left hip.
1 bay gelding with an unreadable brand on the left shoulder.
1 white gelding, 1 bay gelding, and 1 roan mare with no brands that I could see.

We dropped the herd at the place of counting at about 9:15 a.m. After we left the horses the Cormier brothers pointed out the location where they had first found the horses. I identified this location as non-competent allotment No. 1803, Shoots Pretty Things Old Tail—E½SE¼, Sec. 21-1-27.

I easily recognized most of the horses in this herd as the same horses I had seen running with the

horse herd I counted in trespass on January 5, 1955.

I drove into Billings where I checked the following brands for ownership in the office of the Livestock Inspector at the Billings Public Stockyards on Montana Avenue:

[5] Left jaw, Fraser Livestock Co.
[3] RS, R. B. Fraser, Inc.
[6] LH, M. E. Taylor, Box 417, Billings, Montana.
[7] LH, J. Park Taylor, Melrose, Montana.
CBC LT, R. B. Fraser.
6-H LH, C. M. Jr., and Kathleen Shreeve, Willard, Montana.

The brand inspector on duty told me that Bob Fraser had bought the horses branded 6-H left hip and that J. Park Taylor, owner of the brand [7] ("boot") LH, was working at the present time for Bob Fraser.

I then returned to Crow Agency.

Trespass in Range Unit No. 19, July 28, 1955.

I made a range inspection of range unit No. 19, permitted to the Cormier Brothers, on July 28, 1955. I entered the unit boundary at a gate near the section corner of Sections 25, 26, 35 and 36, T. 1 S., R. 27 E., at 11:00 a.m.

I counted 8 cows and 3 calves branded [1] RR grazing in trespass on non-competent Allot. No. 1879, Finds His Enemies Forehead—N½ Sec. 27-T. 1 S., R. 27 E. I continued on through the range unit and counted 18 horses and 3 mules in trespass near

a small reservoir on non-competent Allot. No. 2739, Pearl Costa—NE¼ Sec. 22-1-27. I readily identified these horses and mules as being the same ones that I had counted in trespass on July 8, 1955.

The cattle brand [1] RR is recorded in the name of R. B. Fraser. I then left the range unit and drove into Billings where I visited the Billings Area Office before returning to Crow Agency.

/s/ GORDON I. POWERS.

Subscribed and sworn to before me this 30th day of April, 1956.

[Seal] /s/ DALE F. GALLES,
Notary Public for the State of Montana, residing at Billings, Montana.

My commission expires April 15, 1958.

[Title of District Court and Cause.]

AFFIDAVIT

Civil No. 1804

State of Montana,
County of Yellowstone—ss.

Clark C. Stanton, being first duly sworn, on oath says:

I am and have been for 11 years continuously last past an employee of the United States Bureau of Indian Affairs with my post of duty at Crow Agency, Montana, and have been during that time

charged with the responsibility and authority to supervise and inspect the use of Indian grazing land, including suspected trespasses and other violations of the laws and regulations covering grazing operations on restricted land of the Crow Indian Reservation. On the 24th day of May, 1954, I personally observed the following facts:

On Monday, May 24, 1954, I range counted Unit No. 19, I counted 182 cattle branded [4] on the left shoulder or [1] on the right shoulder. [4] brand and [1] brand are the registered brands of R. B. Fraser.

I also counted 32 horses in the unit but was unable to get close enough to the horses to read the brands.

Using the ratio of 3 cow units to 2 horses, the 32 horses equal 48 cow units. Adding the 48 cow units to the 182 cattle counted equals a total of 230 cow units in the Range Unit No. 19.

The grazing permit on Unit 19 authorizes the grazing of 123 cattle so the unit is overstocked by 107 cow units.

After completing my range count, I returned to Crow Agency having seen or spoken to no one.

/s/ CLARK C. STANTON.

Subscribed and sworn to before me this 30th day of April, 1956.

[Seal] /s/ DALE F. GALLES,
Notary Public for the State of Montana, residing at Billings, Montana.

My commission expires April 15, 1958.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Yellowstone—ss.

Orie E. Dosdall, being first duly sworn, deposes and says:

That I reside on Pryor Star Route out of Billings, Montana, and I am in the business of ranching and farming on lands within the exterior boundaries of the Crow Indian Reservation in Yellowstone County, Montana.

That on the morning of December 17, 1955, and in the presence of Clarence Leischner of Billings, Montana, I observed and inspected about 100 head of cattle branded [1] right rib or [8] left hip or [9] on left rib on restricted Indian non-competent land on which I have a valid lease, which land is more particularly described as the South Half (S½) of Section 16 and the Southwest Quarter (SW¼) of Section 15, Township 4 South, Range 26 East, M.P.M., on the Crow Indian Reservation in Yellowstone County, Montana.

That said cattle are owned by R. B. Fraser who operates a cattle ranch in the vicinity of my land, and that said herd of cattle were on the above-described land without the consent or permission of me or anyone authorized to grant the same.

That again on December 24, 1955, the same 100 head of cattle above-described were grazing upon and observed by me on the land above mentioned

without the consent or permission of me or anyone authorized to grant the same, at which time I drove them off the land under lease to me as above set forth.

That on January 21, 1956, the same 100 head of cattle above described were observed by me on the same land above described at which time I drove them off and on to the land operated by R. B. Fraser.

That continuously from February 23, 1956, to March 6, 1956, the above-described herd of cattle were observed daily upon the restricted land above described without the consent or permission of me or anyone authorized to grant the same.

/s/ ORIE E. DOSDALL.

Subscribed and sworn to before me this 2nd day of May, 1956.

[Seal] /s/ FLORA B. HATHEWAY,
Notary Public for the State of Montana, Residing at Pryor, Montana.

My Commission expires 11/13/58.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Yellowstone—ss.

Joe A. Cormier, being first duly sworn, deposes and says:

That I reside at Billings, Montana, and in conjunction with my brother, Clem Cormier, Billings, Montana, operate a cattle ranch on land located within the exterior boundaries of the Crow Indian Reservation, in Yellowstone County, Montana, which said cattle operation has been conducted by us for many years.

That on January 30, 1952, I observed and inspected about 300 head of cattle branded [1] right ribs or [2] right ribs grazing on the following described restricted Indian non-competent land which is under lease to my brother and me, more particularly described as follows:

> W½NE¼ of Section 3 and N½ of Section 4, all in Township 4 South, Range 26 E., M.P.M.
>
> N½SW¼ and NW¼ of Section 31; SE¼ of Section 32; S½S½NE¼ and S½ of Section 33; W½ and SE¼ of Section 34, all in Township 3 South, Range 26 East, M.P.M.

That said cattle branded as above set forth were known to me to be owned by R. B. Fraser.

That on January 31, 1952, in the presence of my brother Clem Cormier and Gordon I. Powers, land operations officer for the Crow Indian Reservation, I observed and inspected 27 cattle branded [1] right ribs grazing in trespass on the SW¼ of Section 33, Township 3 South, Range 27 East, and 28 cattle branded [2] right ribs or [1] right ribs grazing in trespass on Lots 2 and 3, Section 31, Township

3 South, Range 26 East all being restricted Indian non-competent land on the Crow Indian Reservation, Yellowstone County, Montana, on which my brother or I have a valid lease.

That on February 13, 1952, in the presence of my brother Clem Cormier and Gordon I. Powers, land operations officer for the Crow Indian Resevation, I observed and inspected 49 cows branded [1] right ribs in trespass on the N½SE¼, Section 33, Township 3 South, Range 26 East, being restricted Indian non-competent land under valid lease to my brother and me. On that same day and in the presence of the same persons I observed and inspected 33 cows branded [1] right ribs and 2 steers branded [2] right ribs in trespass on Lot 2, Section 4, Township 4 South, Range 26 East, being restricted Indian non-competent land upon which my brother and I hold a valid lease, both last mentioned parcels being on the Crow Indian Reservation in Yellowstone County, Montana.

/s/ JOE A. CORMIER.

Subscribed and sworn to before me this 2nd day of May, 1956.

[Seal] /s/ THOMAS D. KELLY,
Notary Public for the State of Montana, Residing at Billings, Montana.

My Commission expires Sept. 16, 1956.

[Title of District Court and Cause.]

AFFIDAVIT

State of Montana,
County of Yellowstone—ss.

Clem R. Cormier, being first duly sworn, deposes and says:

That I reside at Billings, Montana, and in conjunction with my brother Joe A. Cormier operate and have been operating for some years a cattle ranch within the exterior boundaries of the Crow Indian Reservation.

That on or about June 12, 1945, I observed and inspected 821 sheep branded [10] red and black paint on back and side owned by R. B. Fraser grazing in trespass on restricted Indian non-competent land more particularly described as Sections 12 and 13, Township 4 South, Range 25 East, on the Crow Indian Reservation in Yellowstone County, Montana, which land was then under a valid lease to my brother and me. Said sheep were on the above-described land without the consent or permission of me or anyone authorized to grant the same.

/s/ CLEM R. CORMIER.

Subscribed and sworn to before me this 2nd day of May, 1956.

[Seal] /s/ DALE F. GALLES,
Notary Public for the State of Montana, Residing at Billings, Montana.

My Commission expires April 15, 1958.

Affidavit

State of Montana,
County of Lewis and Clark—ss.

Wm. G. Cheney, being first duly sworn, deposes and says:

That he now is and has been for sometime the recorder of marks and brands for the Livestock Commission of the State of Montana residing at Helena, Montana, and that the following list of brands are registered to the persons or corporations named, together with the Certificate Number and date of such registration according to the official records of my office of which I am the custodian:

Brand	Place	Owner	Certificate No.	Date	Reference No.
[8]*	cattle—left hip horses—left jaw	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38645	12-31-51	31771-4
[11]	cattle left hip horses—left sho.	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38647	12-31-51	C-31975
CBC	cattle—left rib	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38646	12-31-51	24665-4
H4	cattle—left rib horses—left sho.	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38649	12-31-51	24782-4
[12]	cattle—left rib horses—left jaw	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38753	12-31-51	C-31971
[1]	cattle—right rib	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38642	12-31-51	13191-4

[*See Clerk's note page 2 of this record.]

Brand	Place	Owner	Certificate No.	Date	Reference No.
[1]	cattle —left rib	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38643	12-31-51	13190-4
[13]	cattle —left rib horses—left thi.	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38648	12-31-51	20056-4
[14]	cattle —left rib	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38640	12-31-51	C-31977
[14]	cattle —left hip	R. B. Fraser 2015 1st Ave. No., Billings, Montana	D-38641	12-31-51	C-31979
[1]	cattle —left jaw horses—left jaw	R. B. Fraser 2015 1st Ave. No., Billings, Montana	7730-5	3-26-52	
[1]	cattle —right jaw horses—right jaw	R. B. Fraser 2015 1st Ave. No., Billings, Montana	7731-5	3-26-52	
[15]	cattle —right sho.	Robert B. Fraser 2015 1st Ave. No., Billings, Montana	13717-5	10-22-53	R-3 & 55
[16]	cattle —right rib horses—right thigh	Robert B. Fraser 2015 1st Ave. No., Billings, Montana	13718-5	10-22-53	1860-4 R-3 & 55
[5]	horses—left jaw	Fraser Livestock Co. 2015 1st Ave. No., Billings, Montana	D-38644	12-31-51	C-31972
[5]	cattle —left jaw	Fraser Livestock Co. 2015 1st Ave. No., Billings, Montana	7729-5	3-26-52	
[3]	cattle —left ribs horses—right sho.	R. B. Fraser, Inc. 2015 1st Ave. No., Billings, Montana	7588-5	3-13-52	Trans C-31973
[17]	horses—right thi.	R. B. Fraser, Inc. 2015 1st Ave. No., Billings, Montana	7586-5	3-13-52	Trans C-31974

[4]	cattle —left sho.	R. B. Fraser, Inc. 2015 1st Ave. No., Billings, Montana	7587-5	3-13-52	Trans C-31976
[9]	cattle —left ribs horses—left sho.	Chas. Fraser Pryor Star Rt., Billings, Mont.	D-16159	5- 1-51	30146-4
F - F	cattle —right ribs horses—left sho.	Dan Fraser Box 142, Grass Range, Mont.	D-21194	6- 2-51	10733-4
[18]	cattle —right ribs horses—left thigh	Dan G. Fraser Winnett, Mont.	16357-5	10- 6-54	B-201 C-1297 55
[19]	cattle —right ribs horses—right sho.	Margaret Fraser Grass Range, Mont.	D-21195	6- 2-51	17755-4

/s/ WM. G. CHENEY.

Subscribed and sworn to before me this 30th day of April, 1956.

[SEAL] /s/ S. C. KENNETH,
Notary Public for the State of Montana,
Residing at Helena, Montana.

My Commission expires 10/8/57.

AFFIDAVIT

State of Montana,
County of Big Horn—ss.

We, Joseph B. Mast, Forester, Urban Landon, Range Guard, and Dale J. Buxton, Range Examiner, all Forest Officers of the Indian Forest and Grazing Division, of the U.S. Indian Service, being first duly sworn according to law depose and say:

That on December 31, 1943, at about 3:00 p.m. we saw and identified one horse branded [20] on the left shoulder, one horse branded [3] on the right shoulder and one horse [21] on the left jaw, ranging and grazing without an approved grazing permit within the boundaries of Unit 20A more specifically described as Section 5 and 6. Township 4 South, Range 26 East.

Further that on the same day at about 3:15 p.m. we saw and identified four horses branded [3] on the right shoulder, one horse branded [3] on the right hip, one horse branded [21] on the left jaw, 3 horses branded [22] on the right shoulder, six additional horses branded [3] on the right shoulder and one horse branded [21] on the left jaw, grazing in a state of trespass within the boundaries of Unit 20A on an area more specifically described as Allot. 2432, SE¼ Sec. 32, Township 3 South, Range 26 East, the description of which was identified by finding land marks established by the original survey.

Further that on the same day at about 4:30 p.m. we saw and identified 1085 head of sheep ranging and grazing in trespass on Range Unit No. 23 on Allotment 2118 otherwise described as the SE½NE¼ Sec. 36, Township 3 South, Range 26 East, the description of which was positively identified by finding the corner stone representing the Southeast corner of Section 25, Township 3 South, Range 26 East. That these sheep were branded [10] and identified as R. B. Frazer's.

Further that on the same day we saw and identified 1200 sheep ranging and grazing on non-competent Indian Allotment 3590, the same being definitely located by finding the southwest corner of Section 12, T. 4 S. R. 25 E. That these same sheep were branded [8] and [14] and [10], the same being identified as those of R. B. Fraser of Billings, Montana. Further that we found tracks and marks supporting the fact that fact that these same sheep have been grazing and ranging on the open range lying within the boundaries of Range Unit 20A, and that Mr. Fraser has his sheep camp and night bed ground located in the Southeast quarter of Section 15, Township 4 South, Range 25 East.

Further that this allotment 3590 was reserved from Range Unit 20A for Indian use, that no office contract has been given on this allotment and that therefore Mr. Fraser is in a state of trespass on this area.

In witness whereof, we hereunto set our hands and seals this 3rd day of January, 1944.

/s/ JOSEPH B. MAST,
Forester;

/s/ URBAN LANDON,
Range Guard;

/s/ DALE J. BUXTON,
Range Examiner.

Subscribed and sworn to before me, a notary public, in and for the State of Montana, County of Big Horn, this 3rd day of January, 1944.

[Seal] /s/ ANNA G. SLOAN,
Notary Public.

My commission expires 6-11-44.

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause.]

ORDER

The motions of the defendants both filed here on January 13th, 1956, are before the court for decision on a brief filed by plaintiff, none having been filed by any of the defendants.

The motions call for a more definite statement of the nature of the claim, and for the dismissal of Counts VII, VIII and IX of the complaint for failure to state a claim against R. B. Fraser.

The Court has considered the motions, complaint and brief of plaintiff, and being duly advised and good cause appearing therefor, will sustain the request to strike from the complaint the words: "or some of them" set forth in one of the motions from paragraph VI of the first count, and paragraphs I of the second, third, fourth and fifth counts, and paragraphs I and II of the sixth count of the said complaint. Otherwise the said motions are hereby overruled, with 20 days to answer upon receipt of notice hereof.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed May 26, 1956.

[Title of District Court and Cause.]

ORDER GRANTING PRELIMINARY INJUNCTION

The motion of plaintiff for a preliminary injunction was again brought to the attention of the Court by counsel for the plaintiff on November 27, 1956, and renewed by the filing of the affidavit of Albert Vermandel and the joint affidavit of Clem R. Cormier, Joe A. Cormier, and Albert Vermandel, all showing that cattle bearing the brand A on the left hip of R. B. Fraser, of Billings, Montana, were, on November 18, 1956, to the number of 96 head,

and on November 20, 1956, to the number of 85 head, ranging and grazing on the non-competent allotted lands described in said affidavits, and that such lands are now included in grazing permit contract No. 14-20-252-440, dated August 22, 1955, covering range unit No. 19, on the Crow Indian Reservation, State of Montana, which grazing permit is issued to J. A. and Clem R. Cormier, for the period of December 1, 1955, to November 30, 1960.

The Court has also considered other affidavits filed herein showing trespass by cattle of said R. B. Fraser in the manner and to the effect above described, and having also considered the briefs filed herein by counsel for the respective parties, from all of which sources above referred to it appears that cattle owned or under control of the defendants above named have been found in trespass from time to time upon the lands and in the manner set forth in said affidavits and the complaint on file herein, and by reason thereof the motion for preliminary injunction is hereby granted, and the defendants named in the above-entitled cause, their agents, servants, employees and attorneys are hereby enjoined from driving and drifting, allowing to drift, herding or conveying any livestock on or upon, or permitting the same to be driven, drifted, allowed to drift, herded or conveyed, or pastured, grazed, or fed on or upon any of the lands and premises within the exterior boundaries of the Crow Indian Reservation in the State of Montana, or any part thereof, during the pendency of this action,

save upon any lands and premises lawfully within the possession of said defendants.

/s/ CHARLES N. PRAY,
Judge.

[Endorsed]: Filed and entered November 30, 1956.

[Title of District Court and Cause.]

AMENDED ANSWER

First Defense

The Plaintiff's complaint fails to state a claim against the defendants upon which relief can be granted.

Second Defense

1. Defendants deny each and every allegation contained in plaintiff's first count.

2. Defendants deny each and every allegation contained in plaintiff's second count.

3. Defendants deny each and every allegation contained in plaintiff's third count.

4. Defendants deny each and every allegation contained in plaintiff's fourth count.

5. Defendants deny each and every allegation contained in plaintiff's fifth count.

6. Defendants deny each and every allegation contained in plaintiff's sixth count.

7. Defendants admit that the defendant, R. B. Fraser, had posted a bond in the sum of $687.51 with the Bureau of Indian Affairs, but deny each and every other allegation contained in plaintiff's seventh count, which is not heretofore specifically admitted.

8. Defendants deny each and every allegation contained in plaintiff's eighth count.

9. Defendants deny each and every allegation contained in plaintiff's ninth count.

Third Defense

1. Defendants allege that said First Cause of Action is barred by Statute of Limitations, Title 28, U.S.C.A., Section 2462.

Wherefore, defendants pray that this action be dismissed and that it will hence go without delay, and have and recover from the plaintiff their costs herein.

KURTH, CONNER & JONES,

By /s/ C. W. JONES,
Attorneys for the Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 2, 1957.

[Title of District Court and Cause.]

PRETRIAL ORDER

A pretrial conference was held at the Court Room in the United States Post Office Building at Billings, Montana, on May 29, 1957, at 10:00 a.m. Dale F. Galles, Esquire, and Harlow Pease, Esquire, represented the plaintiff. C. W. Jones, Esquire, represented the defendants.

This is an action for penalties prescribed by statute for trespass of livestock grazing on restricted Indian lands and for injunction.

Stipulations and Admissions

1. Defendants admit the allegations of paragraphs I, II and IV of the First Count of plaintiff's Complaint, which allegations are reiterated and restated in Counts Two to Six, inclusive.

2. Defendants admit the allegations of Paragraph V, except that the words "in accordance with and supplementary to 25 U.S. Code 179" shall be stricken therefrom, which allegations are reiterated and restated in Counts Two to Six, inclusive.

3. Defendants admit the allegations of paragraph III and stipulate with plaintiff that Fraser Livestock Company is a partnership consisting of R. B. Fraser and R. B. Fraser, Jr., and that this action is dismissed as against Charles Fraser also known as Chas. Fraser, who is now deceased.

4. The allegations of paragraph I of the Seventh Count of plaintiff's Complaint are amended to insert after the word "Indians" in line 4, the following: Except lands for which Indian title has been extinguished." Defendants admit the allegations of said paragraph I as so amended, which allegations are reiterated and restated in the Eighth and Ninth Counts of the Complaint.

5. Defendants admit the allegations of paragraph II of the Seventh Count, which allegations are reiterated and restated in the Eighth and Ninth Counts.

6. Defendants admit the allegations af paragraph III of the Seventh Count which allegations are reiterated and restated in the Eighth and Ninth Counts, except for lands described as deeded in Exhibits B and C attached to the Complaint.

7. In the event plaintiff offers proof with respect to trespass on December 15, 1955, alleged in paragraph II of the Sixth Count of plaintiff's Complaint, it is stipulated and agreed that the testimony of Rupert Chamberlain, commencing on page 55 and ending on page 86 of the Transcript of Cause No. 30253 in the District Court of the Thirteenth Judicial District of the State of Montana, in and for the County of Yellowstone, entitled "Orrie E. Dosdall vs. R. B. Fraser and Charlie Fraser" may be submitted in evidence.

8. Defendants admit that Defendant R. B.

Fraser owned and used the F Circle brand on his sheep in 1943 and 1945.

9. Defendants admit that the record of the brands as set forth in plaintiff's Exhibit No. 1 at the hearing on preliminary injunction is a true record in the office of the Recorder of Marks and Brands for the Livestock Commission of the State of Montana at Helena, Montana.

10. Plaintiff and defendants stipulate that the Amended Answer may be filed as a pleading in this action, subject however to the foregoing stipulations and admissions contained in this Order.

/s/ W. J. JAMISON,
United States District Judge.

Approved:

/s/ DALE F. GALLES,
Counsel for Plaintiff.

Approved:

/s/ C. W. JONES,
Counsel for Defendants.

[Endorsed]: Filed July 2, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Court without a jury on July 2,

1957, and the Court having duly considered the pleadings, stipulations and admissions contained in the pretrial order, as well as the evidence, and being fully advised in the premises now finds the following:

Findings of Fact

I.

Plaintiff brings this action in its sovereign capacity for the use and benefit of the Indians of the Crow Indian Reservation and the Crow Indian Tribe, wherefore this Court has jurisdiction of the action.

II.

The Crow Indian Reservation is and at all times herein stated was a duly established Indian reservation under the laws of the United States, located within the State and District of Montana and within the Billings Division of said District, a plat of which is attached to the Complaint on file herein; that except for certain isolated tracts of land for which patents have been issued by plaintiff herein, the title to said lands in said reservation is and at all times herein stated was in the plaintiff in trust for the Crow Indian Tribe or certain members thereof; that said land at all times herein stated was and now is managed and supervised by the plaintiff through its agency created for that purpose, to wit, the Bureau of Indian Affairs.

III.

The Defendant R. B. Fraser is and at all times mentioned herein was a citizen and resident of the

State and District of Montana and within the Billings Division of the said District, and is and was the owner of lands and livestock and the lessee or grazing permittee of other lands, all of which are within the exterior boundaries of the Crow Indian Reservation. That Defendant R. B. Fraser, Jr., is and was the owner of certain land within the exterior boundaries of the Crow Indian Reservation and is the son of Defendant R. B. Fraser, and a stockholder in Defendant R. B. Fraser, Inc., a corporation, being associated with Defendant R. B. Fraser in the livestock business. That this action was dismissed as against Charles Fraser, also known as Chas. Fraser, who is now deceased. That Defendant R. B. Fraser, Inc., is a corporation organized and existing under the laws of the State of Montana in which Defendants R. B. Fraser and R. B. Fraser, Jr., are stockholders. That Defendant Fraser Livestock Co. is a partnership consisting of R. B. Fraser and R. B. Fraser, Jr.

IV.

Except for said patented lands, all other lands in the Crow Indian Reservation are and at all times herein stated were Indian trust lands, owned beneficially either by the Crow Tribe or by allottees who are members of said tribe, or heirs of such members, and the right to the exclusive occupation and enjoyment thereof was and is in the said Indians subject only to duly approved leases and grazing permits.

V.

On or about February 13, 1952, cattle owned by Defendant R. B. Fraser and managed and herded by him or his agents and servants, to wit, 82 cows, were found in trespass upon Indian trust land within the Crow Indian Reservation and on which said defendant did not have a lease, permit, license or privilege; that said animals were allowed to drift and graze upon plaintiff's said lands wrongfully, wilfully and without the consent of the plaintiff or the Indian owners thereof.

VI.

The plaintiff failed to prove the allegation of paragraph I of the Third Count of the Complaint as to the identity and ownership of the cattle therein described.

VII.

On or about July 8, 1955, horses and mules owned by defendants R. B. Fraser, Fraser Livestock Co., and R. B. Fraser, Inc., and managed and herded by them or their agents and servants, to wit, 9 horses and 3 mules, were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which said defendants did not have a lease, permit, license or privilege; that said animals were allowed to drift and graze upon plaintiff's said lands wrongfully, wilfully and without the consent of the plaintiff or the Indian owners thereof.

VIII.

On or about July 28, 1955, cattle owned by defendant R. B. Fraser and managed and herded by

him or his agents and servants, to wit, 8 cows and 3 calves, were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which said defendant did not have a lease, permit, license or privilege; that said animals were allowed to drift and graze upon plaintiff's lands wrongfully, wilfully and without the consent of the plaintiff or the Indian owners thereof.

IX.

From time to time over the period from 1945 to the filing of this action, defendants have allowed cattle and horses to drift and graze upon the lands of the Crow Indian Reservation upon which they held no valid lease or grazing permit, causing said livestock to graze and pasture on said lands. The drifting and grazing of said livestock was done or permitted by the defendants knowingly, wilfully, and without the consent either of the Indians affected thereby or the Superintendent of said Reservation, and in defiance of the plaintiff, and its officers and employees, having the supervision and management of said lands.

X.

In addition to the trespasses set forth above, defendants or their agents and servants caused or permitted to drift or graze upon Indian trust land within the Crow Indian Reservation and upon which defendants had no permit, lease or privilege whatever, certain livestock as follows:

June 12, 1945.....821 sheep
January 28, 1952.....300 cattle
January 30, 1952..... 55 cattle
February 4, 1952..... 73 cattle
December 15, 1955..... 90 cattle

XI.

Defendants have been requested repeatedly by plaintiff to remove their trespassing livestock from said lands, but defendants have permitted such trespasses to continue and without payment therefor. Trespasses have occurred which did not afford an opportunity to count the animals involved. A multiplicity of actions would be required to recover for each transaction. The plaintiff has no plain, speedy, or adequate remedy at law.

XII.

Subsequent to the filing and service of Complaint, defendants or their agents caused or permitted livestock to drift or graze upon Indian trust land within the Crow Indian Reservation and upon which defendants had no permit, lease, or privilege on March 21, 1956, March 29, 1956, April 9, 1956, November 20, 1956, December 12, 1956, January 17, 1957 and March 27, 1957.

XIII.

There was no evidence of any actual damage to the lands upon which defendants' livestock trespassed. There was evidence and the court finds that overgrazing causes permanent damage to the inheritance of the land, but the damages caused by

overgrazing are difficult to determine and are not capable of exact computation. Continued trespassing by defendants threatens overgrazing and consequent irreparable damage and injury to the inheritance of the lands.

XIV.

The defendant R. B. Fraser is the permittee named in grazing permit dated November 17, 1950, a copy of which is attached to the Complaint herein, marked "Exhibit B." This permit was modified by instrument dated February 23, 1952, a copy of which is attached to the Complaint and marked "Exhibit C." The lands described in Exhibit B, as modified by Exhibit C, are and at all times herein stated were Indian Trust lands, owned beneficially either by the Crow Tribe or by allottees who are members of said tribe, or heirs of such members, and the right to the exclusive occupation and enjoyment thereof was in said Indians, subject only to duly approved grazing permits or leases.

XV.

By the terms of Exhibit B attached to the Complaint on file herein the defendant R. B. Fraser was granted grazing privileges for 83 head of cattle for each grazing season and by the terms of Exhibit C attached to the Complaint on file herein said permit was modified by reducing the number of cattle from 83 to 82 per grazing season during the life of said permit. It is further provided by "Range Control Stipulations" attached to said Exhibit B that if the number of livestock authorized by the permit is exceeded, without previous authority, the permittee

will be required to pay in addition to the regular charges, the penalty equal to 50% thereof for such excess stock.

XVI.

On or about May 24, 1954, defendant R. B. Fraser caused to drift and graze upon Range Unit No. 19, described in said Exhibit B attached to the Complaint, 182 head of cattle and 3 head of horses. On or about November 4, 1954, defendant R. B. Fraser caused to drift and graze upon Range Unit No. 19, described in said Exhibit B, 196 head of cattle and 3 head of horses, which under the terms of said permit constituted 77½ cow units in excess of the number authorized and permitted.

XVII.

Said grazing permit was cancelled on December 31, 1954, by the Bureau of Indian Affairs. The grazing fees required under said permit for the month of December, 1954, in the sum of $114.64 were not paid. Plaintiff demanded payment thereof from the defendant R. B. Fraser, and he has failed and refused to pay said sum or any part thereof.

XVIII.

A bond posted by defendant R. B. Fraser in connection with the grazing permit hereinabove described was forfeited upon the cancellation of said permit, and the defendant R. B. Fraser is entitled to a credit in the sum of $687.51 by reason of the forfeiture of said bond.

Conclusions of Law

I.

This court has jurisdiction.

II.

At all times mentioned herein there existed a duly promulgated and existing regulation of the Department of the Interior of the United States (25 C.F.R., 71.21), which provided, in accordance with and supplementary to 25 U.S. Code 179, as follows:

> "No. 71.21. Trespass. The owner of any livestock grazing in trespass on restricted Indian lands is liable to a penalty of $1. per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed."

The following acts are prohibited:

> "(a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit."
>
> "(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit."

III.

The recovery sought by plaintiff under its First Count is a penalty under Title 25 U.S.C. Sec. 179, and this cause of action is barred by the provisions of Title 28 U.S.C. Sec. 2462.

IV.

Under the Second Count of Plaintiff's Complaint, the defendant R. B. Fraser is liable to the plaintiff under 25 U.S.C.A. Sec. 179 and 25 C.F.R. Sec. 71.21 for the sum of $82.00, with interest thereon from February 13, 1952, at the rate of 6% per annum until judgment is entered thereon.

V.

Plaintiff is not entitled to any recovery from the defendants under the Third Count of plaintiff's Complaint.

VI.

Under the Fourth Count of Plaintiff's Complaint, the defendant R. B. Fraser is liable to the plaintiff under 25 U.S.C.A. Sec. 179 and 25 C.F.R. Sec. 71.21 for the sum of $12.00, with interest thereon from July 8, 1955, at the rate of 6% per annum until judgment is entered thereon.

VII.

Under the Fifth Count of Plaintiff's Complaint, the defendant R. B. Fraser is liable to the plaintiff under 25 U.S.C.A. Sec. 179 and 25 C.F.R. Sec. 71.21 for the sum of $11.00, with interest thereon from July 28, 1955, at the rate of 6% per annum until judgment is entered thereon.

VIII.

Plaintiff is entitled to a permanent injunction against the defendants, and each of them, enjoining them or their agents and servants from allowing to

drift and graze any livestock whatever on or upon, or permitting or allowing the same to be conveyed or pastured or grazed or fed on any of the lands and premises within the exterior boundaries of the Crow Indian Reservation, title to which is in plaintiff in trust for the Crow Indian Tribe or any member thereof, or otherwise interfering with the possession, use and enjoyment of said lands and premises by the plaintiff and its Indian wards, except upon any lands and premises lawfully within the possession of said defendants.

IX.

Under the Seventh and Eighth Counts of Plaintiff's Complaint defendant R. B. Fraser is liable to plaintiff under the terms of the grazing permit attached to the Complaint as Exhibit B, as modified by Exhibit C, for 77½ cow units in excess of the number authorized and permitted, in the sum of $1,950.44, as liquidated damages, less the sum of $687.51 as a set-off, or a net total of $1,262.93, with interest at 6% per annum from May 24, 1954.

X.

Under the Ninth Count of Plaintiff's Complaint, the defendant R. B. Fraser is liable to plaintiff for grazing fees under the grazing permit attached to Complaint as Exhibit B for the month of December, 1954, in the sum of $114.64, with interest at 6% per annum from September 1, 1954.

Let judgment be entered accordingly.

Dated this 1st day of November, 1957.

/s/ W. J. JAMESON,
United States District Judge.

[Endorsed]: Filed November 1, 1957.

[Title of District Court and Cause.]

OPINION

This action contains nine counts. In the first five counts plaintiff seeks recovery of a statutory penalty for livestock trespassing upon Indian lands, and in the sixth count a permanent injunction prohibiting the grazing of livestock by defendants upon these lands. In the seventh and eighth counts plaintiff seeks recovery for overstocking lands included in a grazing permit issued by plaintiff to defendant R. B. Fraser, and in the ninth count a balance due under this permit for the year 1954.

First Count

In its first count, plaintiff seeks recovery of a penalty of $1.00 per head, or a total of $2,285.00, for the trespass of 2,285 sheep, upon Indian Trust land of the Crow Indian Reservation on December 31, 1943. This cause of action is asserted under Title 25 U.S.C. Sec. 179, which provides:

> "No. 179. Driving stock to feed on lands. Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range

and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of $1 for each animal of such stock. This section shall not apply to Creek lands. (R.S. No. 2117; Mar. 1, 1901, c. 676, *31 Stat. 871)."

Supplementing the statute, the Department of the Interior adopted the following regulation:

"No. 71.21 Trespass. The owner of any livestock grazing in trespass on restricted Indian lands is liable to a penalty of $1 per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed."

"The following acts are prohibited:

(a) The grazing upon or driving across any restricted Indian lands of any livestock without an approved grazing or crossing permit, except such Indian livestock as may be exempt from permit.

(b) Allowing livestock not exempt from permit to drift and graze on restricted Indian lands without an approved permit." 25 C.F.R. 1956 Supp. 71.21.

Defendants contend that the action is barred by Title 28 U.S.C. Sec. 2462, which reads:

"No. 2462. Time for commencing proceedings. Except as otherwise provided by Act of Congress, an action, suit or proceeding for the

> enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

Plaintiff argues that this proceeding is not an action for a penalty but one for the recovery of civil damages of a compensatory nature, and that the so-called penalty is in fact liquidated damages. In support of this contention, counsel rely primarily upon Rex Trailer Co. vs. United States, 350, U.S. 148, 100 L. Ed. 149, 76 S. Ct. 219; Meeker vs. Lehigh Valley Railroad Co., 236 U.S. 412, 59 L. Ed. 644, 35 S. Ct. 328; and United States vs. Weaver, 5 Cir. 1953, 207 F.2d. 796. In my opinion all of these cases are distinguishable. They involved contractual relations in which the Government was a party. Rex Trailer Co. vs. United States, for example, involved the purchase of goods from War Assets Administration. In concluding that the recovery was civil in nature, the court recognized that, "The Government has the right to make contracts and hold and dispose of property and * * * may resort to the same remedies as a private person." It held that liquidated damages are "a well known remedy" and when reasonable are not to be regarded as penalties. The instant case, however, does not involve any lease or other contractual relation, insofar as the first

count is concerned, but rather a trespass, without right, upon Indian land held in trust by the Government. The doctrine of liquidated damages accordingly is not applicable.

It may reasonably be inferred also from the regulations that the Department of Interior has construed the recovery of $1 per head as a penalty rather than compensatory damages, in view of the additional provision for recovery of "a reasonable value of the forage consumed and damages to property injured or destroyed." 25 C.F.R. 1956 Supp. 71.21, supra.

Counsel have not cited, nor have I found, any cases which have passed upon the question of whether Title 28 U.S.C. Sec. 2462 is applicable to a cause of action asserted under Title 28 U.S.C. Sec. 179. In a long line of cases, however, the courts have consistently treated recovery under Section 179 as a penalty. See for example United States vs. Ash Sheep Co., 9 Cir. 1918, 250 F. 592, affirmed 1920, 252 U.S. 159, 64 L. Ed. 507, 40 S. Ct. 241, where R.S. 2117 (U.S.C. Sec. 179) was construed as a "penal statute"; Janus vs. United States, 9 Cir. 1930, 38 F. 2d. 431, 438 where the court held that the penalty for trespassing under Section 179 may be recovered by either civil or criminal action; Connolly vs. United States, 9 Cir. 1945, 149 F.2d 666; United States vs. Loving, D.C.N.D. Tex. 1888, 34 F. 715.

It is my conclusion that the recovery sought under the first count is a penalty, and that the cause

of action asserted under this count is barred by the provisions of Title 28 U.S.C. Sec. 2462, supra.

Second, Third, Fourth and Fifth Counts

In the second, third, fourth and fifth counts, plaintiff seeks to recover the penalty prescribed by Title 25 U.S.C. Sec. 179, supra, for livestock trespassing on Indian lands in violation of the statute and regulations of the Secretary of the Interior, issued pursuant to authority conferred by Title 5 U.S.C. Sec. 22, and Title 25 U.S.C. Sec. 466, and found in 25 C.F.R., 1956 Supp., Sec. 71.21, supra (First Count).

Plaintiff concedes a failure of proof with respect to the third count. Under the second count plaintiff proved a trespass of 82 head of cattle on February 13, 1952; under the fourth count, a trespass of 9 horses and 3 mules on July 8, 1955; and under the fifth count, a trespass of 11 head of cattle on July 28, 1955.

Defendants contend that the statute requires a wilful or intentional trespass; that to the extent the regulations attempt to make the proof of trespass less onerous, they are unconstitutional; and that the evidence does not justify a finding of wilful or intentional trespass. Plaintiff contends that the proof is sufficient to show that defendants allowed their cattle to drift and graze upon the Indian lands in violation of the statute and regulations, and that the continuing nature of the trespasses justifies a finding of wilful trespass.

It is well settled (1) that the United States can prohibit absolutely or fix terms on which its property may be used; (2) that Congress has the exclusive right to control and dispose of the public lands of the United States; and (3) that when that right has been exercised with reference to lands within the borders of a state, neither the state nor any of its agencies has any power to interfere. United States vs. Grimaud, 220 U.S. 506, 55 L. Ed. 563, 31 S. Ct. 480; Light vs. United States, 220 U. S. 523 55 L. Ed. 570, 31 S. Ct. 485; Utah Power & Light Co. vs. United States, 243 U.S. 389, 404, 37 S. Ct. 387, 61 L. Ed. 791; Griffin vs. United States, 8 Cir. 168 F.2d. 457.

The power of Congress to control public lands may be exercised through vesting in the Secretary of the Interior the right to make rules and regulations necessary to effectuate the legislative policy. Regulations of the type here under consideration have long been held a valid exercise of delegated power. United States vs. Grimaud, supra. In LaMotte vs. United States, 254 U.S. 570, 65 L. Ed. 410, 41 S. Ct. 204, the Supreme Court held valid regulations of the Secretary of the Interior relating to grazing leases by members of an Indian tribe, affirming an injunction against defendants where their failure to conform was "not accidental, but intentional and persistent." Regulations issued by the Secretary of the Interior were upheld also in United States vs. Travis, W. D. Ky. 1946, 66 F. Supp. 413, and United States vs. Johnston, S.D. W. Va. 1941, 38 F. Supp.

4. See also Fussell vs. United States, 5 Cir. 1939, 100 F.2d. 995.

Defendants have the burden of showing that regulations are not clearly within the statutory authority. As was said in United States vs. Watkins, 2 Cir. 1949, 173 F.2d. 599, "Regulations having been duly adopted, the burden is on one who questions them to show their invalidity. Montana Eastern Limited vs. United States, 9 Cir. 1938, 95 F.2d. 897. And this burden can be carried only by showing as a minimum that the regulations are inconsistent with the underlying statute or are unreasonable or inappropriate. United States vs. Morehead, 243, U.S. 607, 37 S. Ct. 458, 61 L. Ed. 926; Boske vs. Comingore, 177 U.S. 459, 20 S. Ct. 701, 44 L. Ed. 846." Defendants here have not shown that the regulations are unreasonable or inconsistent with the statute, and it is my conclusion that the regulations are valid.

It is true that in most cases involving trespass of livestock on Government land the court has found an element of intent or wilfulness (or acts from which wilfulness could be inferred) on the part of the owner of the livestock. In Light vs. United States, supra, perhaps the leading case involving trespassing livestock on public domain, the court said:

> "Even a private owner would be entitled to protection against wilful trespasses, and statutes providing that damage done by animals cannot be recovered, unless the land had been enclosed with a fence of the size and material required,

do not give permission to the owner of cattle to use his neighbor's land as a pasture. They are intended to condone trespasses by straying cattle; they have no application to cases where they are driven upon unfenced land in order that they may feed there * * *

"Fence laws do not authorize wanton and wilful trespass, nor do they afford immunity to those who, in disregard of property rights, turn loose their cattle under circumstances showing that they were intended to graze upon the lands of another.

"This the defendant did, under circumstances equivalent to driving his cattle upon the forest reserve * * *

"It appears that the defendant turned out his cattle under circumstances which showed that he expected and intended that they would go upon the reserve to graze thereon. Under the facts, the court properly granted an injunction." See also: Shannon vs. United States, supra.

In United States vs. Thompson, E.D. Wash. N.D. 1941, 41 F. Supp, 13, the evidence disclosed that the defendant was "owner of a small number of cattle which have been and are straying on the United States national forest lands and grazing thereon." There was "no evidence of deliberate or intentional driving his stock onto the Government's land. Defendant just simply permits his stock to be loose and

they graze upon his land, upon the lands of private owners and upon Government land * * *" In granting an injunction, the court said:

> "At the trial, plaintiff relied upon two cases: Light vs. United States, supra, and Shannon vs. United States, 9 Cir., 160 F. 870, 875.
>
> "The defendant attempts to distinguish the two cases on the ground that they both involved actual or intended trespasses upon the part of the owners of the cattle. While that is true, and strictly speaking, the two cases can only be of value in cases of similar import, nevertheless I am convinced from the language of the two opinions they compel the acceptance of the conclusion that the holdings would have been the same without the evidence as to intention of trespass. That is particularly true in the Shannon case * * *"

The facts and circumstances surrounding the several trespasses in this case were not so strong as those in the Light and Shannon cases to establish a "wilful trespass." On the other hand, the Government here made a stronger showing than in the Thompson case. Were the trespasses here in fact wilful?

In a criminal action involving turpitude, "wilful" is "generally used to mean evil purpose, criminal intent or the like." In an action which does not involve turpitude, the word "is often used without any such implication * * * it often denotes that which is

'intentional, or knowing, or voluntary, as distinguished from accidental' and * * * is employed to characterize 'conduct marked by careless disregard whether or not one has the right so to act'." United States vs. Illinois Central Railroad Co., 303 U.S. 239, 58 S. Ct. 533, 82 L. Ed. 773—an action to recover a penalty for violation of a statute prescribing a limitation on period of continuous confinement for stock. The court continued: "* * * So, giving effect to these considerations, we are persuaded that it means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements.

The proof here indicates a "careless disregard" of the consequences and a "plain indifference" to the provisions of the statute. While there is no showing that defendants drove their cattle upon plaintiff's land, defendants could reasonably anticipate that their livestock would drift onto plaintiff's land and subject them to the penalty prescribed by statute. The action does not involve an isolated act of trespass. Rather there was evidence of acts of trespass on December 31, 1943, June 12, 1945, January 30, 1952, February 4, 1952, February 12, 1952, July 8, 1955, July 28, 1955 and December 17, 1955. It is my conclusion that the evidence was sufficient to establish wilful trespasses under the second, third and fourth counts and that plaintiff is entitled to judgment for the respective amounts proved under those counts.

Sixth Count

In the sixth count plaintiff seeks a permanent injunction. On November 30, 1956, Judge Charles N. Pray entered an order granting plaintiff's motion for a temporary injunction, in which defendants were enjoined from "driving and drifting, allowing to drift, herding or conveying any livestock on or upon, or permitting the same to be driven, drifted, allowed to drift, herded, or conveyed, or pastured, grazed, or fed on or upon any of the lands and premises within the exterior boundaries of the Crow Indian Reservation in the State of Montana, or any part thereof, during the pendency of this action, save upon any lands and premises lawfully within the possession of said defendants."

In granting the temporary injunction, Judge Pray considered the acts of trespass specified in the discussion of the second, fourth and fifth counts and in addition further acts of trespass on November 18th and November 20th, 1956. For the purpose of considering whether a permanent injunction should be granted, the court also received evidence at the trial of subsequent acts of trespass on March 21, 1956, March 29, 1956, April 9, 1956, December 12, 1956, January 17, 1957 and March 27, 1957. The continuing nature of the trespasses justifies a permanent injunction.

Defendants argue with respect to the first six counts that the action is in fact for the benefit of a white permittee of the lands in question, that no

damage has been shown to the tribe or Indian allottees, and that accordingly the Government has no right to maintain the action. It is true that in part at least these counts involve a controversy between defendants and the white permittee. In addition, however, it is alleged in the sixth count that the trespasses and overgrazing cause irreparable damage and injury to the inheritance of the lands. While no specific damage was shown to the lands in question, there was substantial evidence that overgrazing does in fact injure the lands. The penalties are for the use and benefit of the Tribe and its members.

The departmental regulations provide that it is "within the authority of the Secretary of the Interior to protect Indian tribal lands against waste" and that "overgrazing, which threatens destruction of the soil is properly considered waste." 25 C.F.R. 1956 Supp. 71.1.

It is well settled that "the Government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers." Camfield vs. United States, 1897, 167 U.S. 518, 524, 17 S. Ct. 864, 866, 42 L. Ed. 260. The Government has the same rights with respect to lands held in trust for Indian tribes. United States vs. West, 1956, 9 Cir. 232 F.2d. 694; United States vs. Gray, 18 Cir., 1912, 201 F. 291; and United States vs. Fitzgerald, 8 Cir. 1912, 201 F. 295. "It is the right and the duty of the Government to maintain such suits as may be necessary for the protection of its Indian wards * * * And particularly is

this true where the United States holds lands in trust for the use and benefits of these wards and suit is necessary for the protection of the lands," (citing cases). United States vs. Colvard, 4 Cir. 1937, 89 F.2d. 312. See also: LaMotte vs. United States, supra.

It is admitted that title to the lands in question is in "plaintiff in trust for the Crow Indian Tribe or certain members thereof" and that the lands are "managed and supervised by plaintiff" through the Bureau of Indian Affairs. In my opinion this action is properly maintained by the Government for the use and benefit of the Crow Indian Tribe and its members.

Seventh and Eighth Counts

Under the seventh and eighth counts plaintiff seeks recovery of "penalties" for overstocking under a grazing permit issued by plaintiff to defendant R. B. Fraser. Plaintiff contends that the so-called "penalty" is rather liquidated damages. Defendant contends that it is in fact a penalty, and in the absence of proof of actual damages, there can be no recovery.

The grazing permit was issued pursuant to regulations prescribed by the Secretary of the Interior (25 C.F.R. 71) and accepted by the defendant-permittee, subject to its "conditions and the attached range control stipulations." Under this permit defendant was authorized to hold and graze 83 head of cattle on tribal land on the Crow Reservation within

Range Unit No. 19, the permit providing that it was issued with the understanding that a total of 124 head would be grazed on the unit, the carrying capacity of the privately owned or leased land being 41 head of cattle. Permittee agreed to pay $16.778 per head for year long grazing on the Reservation land, or a total annual payment of $1,392.61. The total number of cattle allowed on the unit was later modified to 123 head by reason of withdrawal of a 40-acre tract from the Reservation land, with the resulting reduction from 83 to 82 of the carrying capacity on the Reservation land.

This is a so-called on-and-off permit, for which provision is made as follows:

> "On-and-off grazing permits will be granted to persons owning livestock which will graze on a range unit where only a part of such unit is Indian land. This permit will be granted for the total number of livestock to be grazed on the entire unit but the permittee will be required to pay grazing fees only for the estimated carrying capacity of the Indian lands involved."

25 C.F.R. 1956 Supp., 71.20.

The grazing permit contains the following provision:

> "It is further understood and agreed that if the permittee allows a greater number of livestock than the total number herein stipulated to graze upon this range unit of which the Indian range is a part, during the period this permit is

in effect, this on-and-off clause shall immediately become null and void and the stock in excess of the number upon which fees are paid to the Indians shall be considered as in a state of trespass and treated accordingly."

Range regulation stipulations attached to the permit include:

"3. Unless the number of livestock specified in the permit is reduced by the Commissioner of Indian Affairs, the permittee will not be allowed credit or rebate in case the full number is not grazed on the area. However, if the number authorized is exceeded without previous authority, the permittee will be required to pay in addition to the regular charges as provided in the permit, a penalty equal to 50 per cent thereof for such excess stock and the stock will be held until full settlement has been made."

"15. All permittees must avoid trespassing. In case of trespass the herder and packer may be excluded from the reservation. The owner is liable to prosecution for civil damages * * * The following acts constitute trespass:

(a) The grazing upon or the driving of any stock across the reservation without a written permit, or the grazing upon or the driving across any reservation in violation of the terms of a permit." * * *

"(e) Violation of any of the terms of the grazing permit or crossing permit."

Proceeding under Par. 3 of the Range Control Stipulations, the Government alleges in the seventh count an overstocking on or about May 24, 1954, of 182 head of cattle and 32 head of horses. Considering one horse as equal to one and one-half cow units results in an excess of 107 cow units. At one and one-half times the rate of $16.778 per head, the amount claimed is $2,693.19, less a set-off of $687.51 by reason of forfeiture of a bond. The eighth count alleges a similar overstocking on or about November 4, 1954, of 196 head of cattle and 17 head of horses, or an excess of 98 cow units, resulting in a claim of $2,466.66. Demand and refusal of the amounts claimed under these counts were alleged and proved.

The evidence sustains a finding that an excess of the number of cattle alleged in each count was on the range unit on the dates specified. With respect to the horses, the Government witnesses testified that they were unable to get close enough on either occasion to identify the brands. Defendant testified that it was possible two or three saddle horses belonging to him were on the unit on the respective dates, but that Indian horses ranged practically at will, and he was of the opinion that most, if not all, of the horses were wild Indian horses. The difficulty experienced by the Government employees in approaching the horses lends some support to that contention. In any event, it appears to me that the evidence is insufficient to support a finding that the horses belonged to defendant, except for two or three saddle horses admitted by defendant.

Defendant testified that the land within the range unit was used by him in the spring and fall as a gathering and roundup place for other cattle owned by him, and that at times in the summer there were considerably fewer cattle on the unit than were authorized by this permit. This, however, can be no defense in view of the fact that the permit contained no provision for average stocking or carrying capacity (as in U.S. vs. Kirby, 260 U.S. 423). In fact the Range Control Stipulations specifically provide that no credit or rebate will be allowed in case the full number is not grazed on the area. (Par. 3 supra). Nor was authority obtained as provided in the Range Control Stipulations for permission to drive livestock across the area, or for bedding or camping privileges (Par. 4). The permit itself did not authorize such use at the discretion of the permittee.

The Government contends that the provision for payment by permittee of regular charges plus 50 per cent for stock in excess of the number specified in the permit, is a provision for liquidated damages under the lease-contract entered into by the parties, and that since two distinct violations occurred the defendant R. B. Fraser is liable for both the May and November overstocking in the same year. Defendant contends that this provision must be construed as a penalty and that the plaintiff is limited to a recovery of proven actual damages. Defendant asserts further that even if the charges are construed as liquidated damages, in no event should he

be charged with both violations occurring in the same year. Are the charges sought by the Government in these counts in the nature of liquidated damages or penalties, and if the former is the defendant liable under both counts?

There is a third alternative—that under the on-and-off clause of the permit, supra, all excess cattle were "in a state of trespass" and to be "treated accordingly." The regulations issued by the Secretary of the Interior provide that "The owner of any livestock grazing in trespass on restricted Indian lands is liable to a penalty of $1.00 per head for each animal thereof together with the reasonable value of the forage consumed and damages to property injured or destroyed * * *" (25 C.F.R. 1956 Supp., 71.21.)

Giving effect to all of the provisions in both the permit itself and the range control stipulations thereto attached, it is my opinion that the Government had an election to treat the overstocking as a trespass and exact the penalty prescribed by Sec. 71.21 for each act of trespass or recover the penalty provided by Par. 3 of the Range Control Stipulations for the excess number of cattle.

The distinction between liquidated damages and penalties is set forth in the Restatement of the Law of Contracts as follows:

"No. 339. Liquidated Damages and Penalties.

(1) An agreement, made in advance of breach, fixing the damages therefor, is not en-

forceable as a contract and does not affect the damages recoverable for the breach, unless

(a) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and

(b) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation."

(2) An undertaking in a penal bond to pay a sum of money as a penalty for nonperformance of the condition of the bond is enforceable only to the extent of the harm proved to have been suffered by reason of such nonperformance, and in no case for more than the amount named as a penalty, with interest."

See also: Steffan vs. United States, 6 Cir. 1954, 213 F.2d. 266, 270 citing cases and this section of the Restatement. In view of the fact that overgrazing which threatens destruction of the soil is properly considered waste (25 C.F.R. 1956 Supp., No. 71.1), it cannot be said that an additional charge of 50 per cent for grazing privileges of livestock exceeding the established carrying capacity of the range is an unreasonable forecast of just compensation to the Indians for the harm done, and unquestionably such harm in any particular case would be difficult of accurate estimation. The charge of 150 per cent appears to meet the requirements set forth in the Restatement.

The distinction between liquidated damages and penalties was also considered by the United States Supreme Court in the case of United States vs. Bethlehem Steel Co., 205 U.S. 105, 51 L. Ed. 731, 27 S. Ct. 450, where the court said:

> "The courts at one time seemed to be quite strong in their views and would scarcely admit that there ever was a valid contract providing for liquidated damages. Their tendency was to construe the language as a penalty, so that nothing but the actual damages sustained by the party aggrieved could be recovered. Subsequently the courts became more tolerant of such provisions, and have now become strongly inclined to allow parties to make their own contracts, even when it would result in the recovery of an amount stated as liquidated damages, upon proof of the violation of the contract, and without proof of the damages actually sustained * * * The question always is, what did the parties intend by the language used? When such intention is ascertained it is ordinarily the duty of the court to carry it out." "* * * we think it appears from the contract and the correspondence that it was the intention of the parties that this amount should be regarded as liquidated damages, and not technically as a penalty. This view is also strengthened when we recognize the great difficulty of proving damage in a case like this, regard being had to all the circumstances heretofore referred to.

As to whether the use of the word "penalty" is determinative, the court said:

> "* * * It is true that the word 'penalty' is used in some portions of the contract * * * The word 'penalty' is used in the correspondence, even by the officers of the government, but we think it is evident that the word was not used in the contract nor in the correspondence as indicative of the technical and legal difference between penalty and liquidated damages."

See also: Rex Trailer Co. vs. United States, supra; Meeker vs. Lehigh Valley Railroad Co., supra; United States vs. Weaver, supra (under first count).

It is my opinion that the penalty prescribed by Par. 3 of the Range Control Stipulations is in fact a provision for liquidated damages. The excess charge is a reasonable forecast of just compensation for the harm caused by the breach, and the harm is one that is incapable or very difficult of accurate estimation. I do not agree, however, with the Government's contention that it can recover more than once during a lease year. If the penalty is in fact liquidated damages, it must be based on the contract provision for year-round grazing, and it was not intended that the payment should be due each time overstocking was found to exist. Each overstocking might properly be considered an act of trespass under the on-and-off provision, in which event the Government would be limited to $1.00 per head for each separate trespass. If there could be more than

one recovery under Par. 3 of the Stipulations, the amount would be an unreasonable "forecast of just compensation" and could not properly be considered liquidated damages.

The view of liquidated damages is supported by the Regulations issued by the Secretary of Interior on Bond Requirements, 25 C.F.R. 1956 Supp., No. 71.17 providing in part:

> "(b) In lieu of furnishing a surety bond, a permittee may deposit at the time of the first payment of the grazing fees a sum equal to one-half of the annual grazing fees. This sum shall be held by the Area Director as a cash penal bond and may be applied to the grazing fees due for the last six months of the permit; Provided, That no breach of the permit has taken place. In all cases where a cash deposit is made in lieu of a surety bond, the permittee shall execute a proper power of attorney authorizing the Area Director to apply the cash deposit as liquidated damages in the event of any breach of the permit."

The amount which the Government has allowed as a set off in the seventh count is approximately one-half of the defendant's grazing fees for one year and must be presumed to have been deposited as a bond as provided above. It has been treated as forfeited by the Director to apply on the liquidated damages for the breach of the permit.

The situation with respect to these counts is completely different from that presented under the first count. In the first count there was no contractual relationship between the parties, and the defendant was a trespasser, without right, on restricted Indian lands. In the seventh and eighth counts, there was a breach of a contract between the parties, and a specific stipulation in the permits for the compensation to be paid for the breach. In the first count, it could reasonably be inferred from the Regulations that a true penalty was intended. In the seventh and eighth counts, it may reasonably be inferred from the bond provision of the Regulations that liquidated damages were intended.

The largest number of excess cattle at any time was 196 (eighth count). Defendant admitted that there were probably two or three of his saddle horses grazing on the unit. Three horses would be the equivalent of four and one-half cow units, making a total of 200½ cow units. Deducting the carrying capacity of 123 cows, leaves 77½ cow units in excess of the number permitted. 150 per cent of 77½ units or 116¼ units times the rate per head of $16.778 results in a total recovery of $1,950.44. Deducting therefrom the sum of $687.51 under bond forfeiture, results in the sum of $1,262.93, for which judgment should be entered for plaintiff under the seventh and eighth counts, together with interest at 6% per annum from May 25, 1954.

Ninth Count

The permit involved in the seventh and eighth counts was terminated on December 31, 1954, by letter to defendant R. B. Fraser, dated November 26, 1954, in which plaintiff demanded the amounts claimed under the seventh and eighth counts, together with the sum of $114.64 as grazing fees for the period December 1 to December 31, 1954 (Ex. 12). The evidence shows that this sum was not paid. Plaintiff accordingly is entitled to judgment against defendant R. B. Fraser for the sum of $114.64 on the ninth count, together with interest at 6% per annum from December 31, 1954.

Plaintiff shall within ten days prepare and file draft of judgment in accordance with this opinion, and serve a copy upon defendants. Defendants shall have ten days thereafter within which to serve and file objections to the proposed judgment.

Done and dated this 1st day of November, 1957.

/s/ W. J. JAMESON,
United States District Judge.

[Endorsed]: Filed November 1, 1957.

In the District Court of the United States for the District of Montana, Billings Division

Civil No. 1804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. B. FRASER; R. B. FRASER, INC., a Corporation; R. B. FRASER, JR.; FRASER LIVESTOCK CO., a Corporation, and CHARLES FRASER, Also Known as CHAS. FRASER,

Defendants.

JUDGMENT

Be It Remembered:

That the above-entitled cause came on regularly for trial before the above-entitled Court without a jury on July 2, 1957, the Honorable W. J. Jameson, Esq., United States District Judge, presiding; plaintiff being represented by Krest Cyr, Esq., United States Attorney, and Dale F. Galles, Esq., Assistant United States Attorney; and the defendants being represented by the firm of Kurth, Conner and Jones and C. W. Jones, Esq.; evidence was introduced by the respective parties and the cause was submitted to the Court upon briefs thereafter filed and by the Court finally taken under advisement. Thereafter and on November 1, 1957, the Court made and filed

herein its findings of fact and conclusions of law which are hereby referred to and made a part of this judgment by this reference;

Now, Therefore, by reason of the law and the premises,

It Is Adjudged:

1. That the above-named defendants, R. B. Fraser; R. B. Fraser, Inc., a Corporation; R. B. Fraser, Jr.; Fraser Livestock Company, a corporation; and Charles Fraser, their agents, servants, heirs, grantees, lessees, successors and assigns and all persons acting by the direction or authority of said defendants or any of them, be and they hereby are permanently enjoined from grazing, pasturing, or allowing to drift and graze, or permitting or allowing to be conveyed, or pastured, or grazed, or fed, any livestock on any of the lands and premises within the exterior boundaries of the Crow Indian Reservation, title to which is in the plaintiff, the United States of America, in trust for the Crow Indian Tribe or any member thereof or which is owned by any Crow Indian by patent containing a restriction against alienation without governmental approval; or otherwise interfering directly or indirectly, with the possession, use and enjoyment of said lands and premises by the plaintiff or its Indian wards; and from interfering, directly or indirectly, with the possession, use and enjoyment of said lands by any person through the contractual permission of the plaintiff by lease or grazing permit; except upon

any lands and premises lawfully within the possession of said defendants.

2. That the plaintiff recover from the defendant R. B. Fraser money damages as follows:

(a) On the second count of the complaint the sum of $82.00 with interest at 6% per annum from February 13, 1952, to the date of this judgment.

(b) On the fourth count of the complaint the sum of $12.00 with interest at the rate of 6% per annum from July 8, 1955, to the date of judgment.

(c) On the fifth count of said complaint, the sum of $11.00 with interest at 6% per annum from July 28, 1955, to the date of judgment.

(d) On the seventh and eighth counts of said complaint the sum of $1,262.93 with interest at 6% per annum from May 24, 1954, to the date of judgment.

(e) On the ninth count thereof, the sum of $114.64 with interest at the rate of 6% per annum from December 31, 1954, to the date of judgment.

3. That plaintiff recover its cost of suit to be taxed herein as provided by the rules of Court. Costs $328.62.

4. That plaintiff do have and recover nothing on the first count of the complaint.

Done and dated this 21st day of November, 1957.

/s/ W. J. JAMESON,
United States District Judge.

[Endorsed]: Filed and entered November 21, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, That the defendants above named hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 21st day of November, 1957.

KURTH, CONNER & JONES,

By /s/ C. W. JONES,
Attorneys for Appellants.

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Whereas, the above-named Defendants, R. B. Fraser; R. B. Fraser, Inc., a corporation; R. B. Fraser, Jr.; Fraser Livestock Company, a corpora-

tion, and Charles Fraser, also known as Chas. Fraser, have prosecuted an appeal to the United States Court of Appeals for the Ninth Circuit, to reverse the money Judgment and order granting a permanent injunction made and entered in the above-entitled cause by the Judge in the United States Court for the District of Montana, Billings Division, on the 21st day of November, 1957:

The conditions of this bond are such that the undersigned United States Fidelity and Guaranty Company is firmly bound unto the plaintiff, the United States of America, the sum of $2,500.00, and that the appellants should discharge the judgment rendered by the Court of Appeals and pay all costs, interest and such damages as the plaintiff, the United States of America, might suffer by reason of the suspending of the permanent injunction granted herein, then this obligation shall be void, otherwise, to remain in full force and effect.

[Seal] UNITED STATES FIDELITY & GUARANTY COMPANY,

By /s/ JAMES D. HAINEN,
Attorney-in-Fact,
Montana Resident Agent.

[Endorsed]: Filed December 16, 1957.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The defendants-appellants herewith present points upon which they claim the Court erred:

I.

In holding and deciding that on February 13, 1952, cattle owned by defendant, R. B. Fraser and managed and herded by him or his agents and servants, to wit: eighty-two (82) cows, were found in trespass upon Indian trust land within the Crow Indian Reservation and on which said defendant, R. B. Fraser, did not have a lease, permit, license or privilege; and that said animals were allowed to drift and graze upon plaintiff's said lands wrongfully, wilfully, and without the consent of the plaintiff or the Indian owners thereof;

II.

In holding and deciding that on or about July 8, 1955, nine (9) horses and three (3) mules owned by the defendants, R. B. Fraser, Inc., and Fraser Livestock Co. were found in trespass upon Indian trust land within the Crow Indian Reservation, and on which said defendants did not have a lease, permit, license or privilege; and that said animals were allowed to drift and graze upon plaintiff's said lands wrongfully, wilfully and without the consent of the plaintiff or the Indian owners thereof;

III.

In holding and deciding that on or about July 28, 1955, eight (8) cows and three (3) calves owned by defendant, R. B. Fraser and managed and herded by him or his agents and servants were found in trespass upon Indian Trust land within the Crow Indian Reservation, and on which said defendant did not have a lease, permit, license or privilege; and that said animals were allowed to drift and graze upon plaintiff's said lands wrongfully, wilfully and without the consent of the plaintiff or the Indian owners thereof;

IV.

In holding and deciding that from time to time over the period from 1945 to the filing of this action, defendants have allowed cattle and horses to drift and graze upon the lands of the Crow Indian Reservation on which they held no valid lease or grazing permit, causing said livestock to graze and pasture on said lands; that the drifting and grazing of said livestock was done or permitted by the defendants, knowingly, wilfully, and without the consent either of the Indians affected thereby or the Superintendent of said Reservation, and in defiance of the plaintiff, and its officers and employees, having the supervision and management of said lands;

V.

In holding and deciding that the defendants or their agents and servants caused or permitted to drift or graze upon Indian Trust land within the Crow Indian Reservation and upon which defend-

ants had no permit, lease or privilege whatever certain livestock on June 12, 1945; January 28, 1952; January 30, 1952; February 4, 1952; December 15, 1955; March 21, 1956; March 29, 1956; April 9, 1956; November 20, 1956; December 12, 1956; January 17, 1957, and March 27, 1957;

VI.

In holding for the plaintiff and against the defendants on the plaintiff's second count, fourth count and fifth count of its complaint;

VII.

In holding and deciding that the plaintiff is entitled to a permanent injunction against the defendants and each of them and enjoining them or their agents and servants from allowing to drift and graze any livestock whatever on or upon, or permitting or allowing the same to be conveyed or pastured or grazed or fed on any lands or premises within the exterior boundaries of the Crow Indian Reservation, title to which is in the plaintiff in trust for the Crow Indian Tribe, or any member thereof;

VIII.

In holding and deciding that the defendant, R. B. Fraser, is liable to the plaintiff under the plaintiff's seventh and eighth counts of plaintiff's complaint;

IX.

In holding and deciding that the defendant, R. B. Fraser, is liable to the plaintiff for grazing fees under the ninth count of the plaintiff's complaint;

X.

In failing to hold and find that that certain regulation of the Department of the Interior of the United States, to wit: 25 C.F.R. 71.21 Subsection (b) are unreasonable and inconsistent with Section 25 U.S. Code 179, and thereby invalid;

XI.

In finding that the United States was the proper plaintiff and failing to find that the lessee or permittee was the party to bring any trespass or injunctive action herein;

XII.

In holding and deciding that the penalty clause under Subsection 3 of the Range Control Stipulations set forth in Plaintiff's Exhibit No. 9 was a liquidated damage clause and not a penalty clause.

Dated this 12th day of February, 1958.

KURTH, CONNER & JONES,

By /s/ C. W. JONES,
Attorneys for Defendants-Appellants.

Receipt of copy acknowledged.

[Endorsed]: Filed February 12, 1958.

[Title of District Court and Cause.]

MOTION FOR ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE IN APPELLATE COURT

The defendants-appellants move the Court for an order extending the time to file the record on appeal and docket the cause in the appellate court to and including the 14th day of March, 1958, upon the ground that the notice of appeal was filed on the 16th day of December, 1957, that forty (40) days from that date have not yet elapsed, and that because of the prior commitments of the reporter reporting said cause, he has been unable to make a transcript of the testimony in said action, additional time is necessary to properly prepare the record for the appellate court.

KURTH, CONNER & JONES,

By /s/ C. W. JONES,
Attorneys for Defendants-Appellants.

[Endorsed]: Filed January 10, 1958.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE RECORD AND DOCKET CAUSE IN APPELLATE COURT

Upon motion of defendants-appellants, good cause appearing therefor:

It is ordered that the time within which to file the record and docket the above-entitled cause in the United States Court of Appeals for the Ninth Circuit be, and the same hereby is, extended to and including the 14th day of March, 1958.

Dated this 16th day of January, 1958.

/s/ W. J. JAMESON,
Judge.

[Endorsed]: Filed and entered January 17, 1958.

In the District Court of the United States, in and for the District of Montana, Billings Division

Civil Cause No. 1804

UNITED STATES OF AMERICA,

Plaintiff,

vs.

R. B. FRASER, et al.,

Defendants.

TRANSCRIPT OF TESTIMONY

Before: Hon. W. J. Jameson, Judge.

July 2, 1957—10:00 A.M.

Appearances:

DALE F. GALLES, ESQ.,
Ass't. U. S. District Attorney,
Counsel for the Plaintiff.

C. W. JONES, ESQ., of
KURTH, CONNER & JONES,
Counsel for the Defendants.

The Court: The case of the United States versus R. B. Fraser, et al., 1804, is set for trial. Is the plaintiff ready?

Mr. Galles: Plaintiff ready.

The Court: Is the defendant ready?

Mr. Jones: Your Honor, the defendants are ready. I wonder if we could have just a couple of minutes here to explain. I want to explain to my client two exhibits that are proposed to be stipulated and put in reference to the land situation. [1*]

The Court: We could take a 10-minute recess if you like. I might also call attention to the pretrial order that's been signed by Mr. Galles, and it has been signed by the court. I think it is agreeable isn't it?

Mr. Jones: I have a copy of it.

The Court: If you will sign that, then we can file.

(Whereupon, a short recess was here taken; court resumed pursuant to recess, parties present the same as before.)

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Is the defendant ready?

Mr. Jones: Defendant ready, your Honor.

The Court: The Government may proceed.

Mr. Jones: Your Honor, at this time, if I may, we would like to file the pretrial order, it shows that——

The Court: Provide for an Amended Answer? That's setting up the additional defense for 1943?

Mr. Galles: Yes. If it please the Court, by stipulation of counsel, as I understand it, the Government offers in evidence, Plaintiff's Exhibit No. 1, which is a map of the Crow Indian Reservation, and it may be received in evidence in this cause.

Mr. Jones: We will so stipulate, your [2] Honor.

The Court: The exhibit is received.

Mr. Galles: The Government offers in evidence, Plaintiff's Exhibits Nos. 2 and 3, and I understand they may be received in evidence as exhibits, subject to further explanation to show relevancy.

The Court: That is agreeable. Plaintiff's Exhibits 2 and 3 are received in evidence.

MR. URBAN LANDON

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles.

Q. Will you state your name?

A. Urban Landon.

Q. Where do you live? A. Crow Agency.

(Testimony of Urban Landon.)

Q. What do you do?

A. I work for the Fox Oil Company in Hardin.

Q. Did you formerly work for the Bureau of Indian Affairs? A. I did.

Q. When was that?

A. From '38 to about '45.

Q. That is 1938 to 1945? A. Yes, sir. [3]

Q. What was your capacity, Mr. Landon?

A. Well, I was range guard towards the last.

Q. And what did that include in your duties?

A. Well, I was running down all trespasses and counting cattle when they turned them in and when they took them off the units.

Q. Did you have occasion to make a count of some cattle in 1943 on the Crow Indian Reservation, with reference to the defendants in this action, or any of them? A. Counted some sheep.

Q. Some sheep? A. Yes.

Q. Do you have an independent recollection of how many and where that occurred?

A. Well, I don't, I can't recall just off-hand, but it was over on the Pryor country over there.

Q. Did you execute an affidavit in connection with the count of those sheep, Mr. Landon?

A. Yes, sir, we always did, every time we went out and counted.

Q. And you did in this case? A. Yes.

Mr. Galles: Your Honor, I wonder if we might have the motion for preliminary injunction, to which is attached this witness' original affidavit? [4]

(Court handing counsel document.)

(Testimony of Urban Landon.)

Q. Mr. Landon, I am referring now to a document on file in this cause, entitled "Motion for Preliminary Injunction," filed May 3rd, 1956. I want to call your attention to the last page that is attached to that motion and ask you if your signature appears thereon? A. Right there.

Q. That is the middle of the three signatures?

A. The middle of the three signatures, yes, sir.

Q. When did you execute this affidavit?

A. Well, it was in the fall.

Q. Well, I will call your attention to the date, by the Notary Public, the 3rd day of January, 1944?

A. Correct, that is right.

Q. Now, if you are able to review this affidavit, would you be able to state that the matters contained therein were true at the time you made the affidavit? A. Yes, sir.

Q. All right, I wonder if you would do so with reference to the sheep?

Mr. Jones: Your Honor, we will object to this testimony on the grounds and for the reasons that no proper foundation has been laid for the witness to testify from this instrument.

The Court: Well, I think so far he simply [5] asked the question, asked him to refresh his recollection from that.

Mr. Jones: Oh, I thought he asked him to testify.

Mr. Galles: I may go further and ask him to testify, we don't offer this as a refreshing of a pres-

(Testimony of Urban Landon.)

ent recollection, but as a past recollection recorded, that is the basis upon which we are attempting to lay the foundation.

The Court: Objection overruled.

Q. All right, will you state then, referring to the affidavit that you have in your hand, when you observed the sheep that I have referred to, that you counted on the day that you have referred to in your affidavit?

Mr. Jones: We would like to interpose our objection at this time that no proper foundation has been laid, and that it is incompetent and irrelevant.

The Court: Objection overruled, and I might say with respect to the defense of the statute of limitations, I presume that is one question you are raising, Mr. Jones, on the 1943—the court has read the memorandum submitted by both parties and has not reached a conclusion with respect to that. We will [6] reserve a ruling until later, but I am going to permit the evidence to go in subject to your objection, and if you so desire, it may be a continuing objection to all testimony with respect to the 1943 transaction, that is Count 1, with respect to Count 1, and then the court will consider that later.

Q. On what date was it you observed the sheep, Mr. Landon?

A. The 3rd day of January, or we counted them the latter part of December, and we made an affidavit out on the 4th of January.

Q. Well, I want to know when you counted them? A. In the afternoon.

(Testimony of Urban Landon.)

Q. Of what day? A. December 31st.

Q. Where was it? A. On Unit 20-A.

Q. Will you repeat your answer, so the court reporter can get it into the record, please?

A. 20-A.

Q. When you say "20-A," what do you refer to?

A. That was the unit number at that time.

Q. And what is a unit?

A. Well, that was the block set out for a certain permit, a block of land, if I had a map I could—it has been so long ago I have got to refresh my [7] memory.

Q. Well, that is what you have the affidavit in your hand for, is because it is so long ago and it is to refresh your recollection, I wonder if you would step to Plaintiff's Exhibit No. 1, which is on an easel, and point out according to that map of the Crow Indian Reservation, where you saw the sheep that you are referring to.

A. Well, here is one.

Q. Now, that is in what section, township and range?

A. Section 36, 2 South, and 3 East, 3 South, 2 South, and 27 East, 3 South and 26.

Q. Now, will you repeat again the section, township and range, please?

A. Section 36, Township 3 South, and range 26 East.

Q. And is there any particular part of Section 36 in which you found the sheep?

A. Southeast quarter of the Northeast quarter.

(Testimony of Urban Landon.)

Q. And that is marked in red on Plaintiff's Exhibit No. 1? A. That is right.

Q. How many sheep were observed at that location on that day?

A. I think a thousand head, 1200.

Q. Were there any identifying marks on the 1200 sheep you found at that place on that day?

A. Yes, they was branded with an "8," 1+, and Circle F. [8]

Q. What was the first part of your answer?

A. Figure 8, kind of like an $\bar{8}$, like that, and then there was a 1, kind of a cross, and then some of them branded with a circle with the F inside.

Q. Did you observe any other sheep on any other location on that day?

A. On that day we counted some right down in here.

Q. Now, in what section, township and range are you referring?

A. Well, it is 4 South, township 4 South, range 25 East and section—well, it is sections 12 and 13, counted the sheep right on this side, south of the coulee there on the ridge there, I remember that.

Q. And is that area that you are describing where you found more sheep marked in red on Plaintiff's Exhibit No. 1? A. That is right.

Q. And, incidentally, the dates 12/31/43, is written alongside each of the two places that you have identified? A. Right.

Q. Would you resume the stand again, please?

(Witness resumes witness stand.)

(Testimony of Urban Landon.)

Q. In your official capacity as range guard, is that what you were at the time? A. Yes, sir.

Q. For the Crow Indian Agency? [9]

A. Yes, sir.

Q. Did you know who owned or had control of the land on which you found these two sets of sheep?

A. Well——

Q. You can answer that yes or no, do you know who owned or controlled? A. No, I don't.

Q. I don't believe I asked you how many sheep you found on the second description you gave on that date, how many did you find?

A. 1,085 head.

The Court: How many?

A. 1,085.

Q. How were these sheep marked or branded, if they were?

A. Well, they was branded with an 8 and Circle F.

Q. Were they branded in the regular manner sheep are branded? A. Yes, sir.

Q. How was that? A. With paint.

Q. Do you remember the color? A. Black.

Q. Black? A. Yes, sir.

Q. Do you know whose sheep these were?

A. Well, the herder told us it was R. B. Fraser's.

Mr. Jones: We will object—— [10]

The Court: Objection sustained.

Mr. Jones: And ask that the answer be stricken, because the question has been asked and answered, and this answer is hearsay testimony.

(Testimony of Urban Landon.)

The Court: The answer may be stricken.

Q. Do you know who the herder was, do you know his name? A. No, I don't remember.

Q. Pardon? A. No, I don't remember.

Q. Mr. Landon, did you make a check of the records in the agency office to determine who owned the land or had control of the land which you found the sheep you have described—I will ask you again to refer to your affidavit?

A. Who owned the land or who owned—had the permit at that time?

Q. Who owned it or had control of it by permit or lease or otherwise?

(No reply.)

Q. First of all, could you tell me whether or not this was allotted land or not?

A. Yes, it was allotted land.

Q. To whom was it allotted?

A. Well, by gosh, Big Hat, I think, was one of the allotments.

Q. Is there a number that you refer to? [11]

A. Allotment 2118.

Q. Now, on which description was that?

A. That would be in the Southeast quarter of Section 32, Township 3 South, Range 21 East, well, that is allotment 2432, and 2118 is the Southeast quarter of the Northeast quarter of Section 36, 3 South, 26 East.

Q. And that allotment is the same land on which

(Testimony of Urban Landon.)

you first described the sheep that you found on December 31, 1943, is that correct?

A. That is right.

Q. And with reference to the land on which you found the second band of sheep, do you know whose allotment that was?

A. That was allotment 3590, and we found the allotment by finding the section corner of Section 12, Township 4 South, Range 25 East.

Q. Do you know what name that allotment is under? A. I can't recall right off-hand.

Q. It doesn't state in your affidavits?

A. No, it doesn't state.

Mr. Galles: You may examine.

Cross-Examination

By Mr. Jones:

Q. Mr. Landon, when you made this affidavit, do you know who made up the affidavit?

A. I think Joe Mast typed it. [12]

Q. Joe Mast typed it? A. Yes, sir.

Q. And he was the forester at the time?

A. Yes, sir.

Q. Where is Mr. Mast now?

A. I don't know where he is.

Q. I realize this has been a long time ago since you were out there in this area and saw those sheep, do you recall anything other than what is on this affidavit in reference to that?

A. No, I don't, Bill, it has been too long ago.

(Testimony of Urban Landon.)

Q. Do you recall at the time you were a range guard, were you stationed out in this area, or what was your job at that time?

A. Well, I was all over the reservation, whenever somebody would report a trespass case or one of the cattle men had some cattle to count or turn in or take off, why they would send me out to do it.

Q. And did you spend your time in the field?

A. Most of it.

Q. Most of it? A. Most of it.

Q. Who usually reported these trespasses to you? A. Well, the head forester.

Q. Mr. Mast?

A. No, Mr. Buxton was head forester, Mr. Mast was junior forester. [13]

Q. And would Mr. Mast and Mr. Buxton usually go out with you?

A. Lots of times they did, yes.

Q. With reference to this affidavit, do you recall whether or not—did you make any examinations of the Crow records at the time this affidavit was made out, you yourself, that is?

A. In the office?

Q. Yes.

A. Well, I generally read them when—before I signed them.

Q. The affidavit? A. Yes.

Q. But you didn't examine the records of the Crow office?

A. Well, we generally took notes right out in

(Testimony of Urban Landon.)

the field, see, we had our plat books and our note-books and right out in the field with us all the time, and we could find a cornerstone, we would mark it down in our plat book.

Q. I see, and you are certain that this is the land that these sheep were in, this area at this time?

A. Yes, sir.

Q. You are certain as to the exact identification say in this one instance, the Southeast Quarter of the Northeast Quarter of Section 36?

A. Yes, sir.

Q. Well, how did you identify that point at that time? [14]

A. By finding cornerstones of the sections, different sections and then we would go and find a cornerstone, it is all pretty well marked in that country, that part of the reservation.

Q. Did you find these cornerstones or did Mr. Mast or Mr. Buxton find them?

A. We found them all together, generally all looked for them.

Q. Do you recall now finding that cornerstone at that time

A. Yes, I remember finding the cornerstones now.

Q. Well, did you in reference to this, making out this report or affidavit, do you know who had the land leased at the time?

A. Well, Carbon County Livestock Association had it first, and then I think Cormier's got it after

(Testimony of Urban Landon.)

that, they was in the Carbon County Livestock Association at one time.

Q. And they had it leased at that time?

A. Yes, sir.

Q. Do you know what kind of a lease that was?

A. It is a grazing lease, five year permit.

Q. One of these grazing leases, do you know whether it is the same kind of a grazing unit permit that they have now?

A. I don't know whether it is just—I imagine it runs [15] just about the same, I probably—some difference in the clauses and the range per head.

Q. Do you recall who informed you of this trespass? A. Well, Mr. Stanton did.

Q. Did you count these cattle or this livestock at the time these sheep—did you count the sheep?

A. Yes, sir.

Q. Did you count the sheep on Section 12, Township 4 South, Range 25 East?

A. Yes, sir.

Q. Did you yourself count them?

A. Yes, sir.

Q. Did Mr. Mast count them?

A. Mr. Mast counted them and Mr. Buxton counted them.

Q. All three counted them all?

A. Yes, sir.

Q. Then you are absolutely—you are pretty sure in your own mind that this—the Carbon County people had a permit on this share?

(Testimony of Urban Landon.)

A. I am pretty sure.

Q. I see, thank you.

Examination

By the Court:

Q. Mr. Landon, I am not entirely clear on the brand on these sheep in the East Half of Section 36, do I understand that some had one brand and others had another brand? [16]

A. Well, there was some in different band see, some sheep had some like this figure 8 here, and some had this 1 plus and some had this Circle F.

Q. So there were three different brands?

A. Three different brands.

Q. Some had the 8, or what appeared to be the figure and some a 1 plus?

A. 1 plus or 1 cross, and the other is, some had the Circle F.

Q. Some had the Circle F? A. Yes, sir.

Q. Do you know how many?

A. No, I couldn't, that would be pretty hard to count.

Q. But there were the three different brands?

A. Yes.

Q. What about that sheep that you found on Sections 12 and 13, did they all have the same brands?

A. Well, yes, they was pretty much the same brand on all of them, that is they had the Circle F and the 8 and the 1 plus on them.

(Testimony of Urban Landon.)

Q. Now, do I understand that some had the Circle F, and some had the 8 and some the bar?

A. Yes, sir.

Redirect Examination

By Mr. Galles:

Q. Mr. Landon, I want to refer to this part of your affidavit with reference to Section 36 I believe [17] it is, yes, that is the first count that you testified here today? A. 36.

Q. I will point out the paragraph to you.

A. Section 36, here it is.

Q. Now, I notice in your affidavit that you say that these sheep were branded Circle F and identified as R. B. Fraser's? A. That is correct.

Q. I don't see in your affidavit where there were part of those 1,085 sheep that had any other brand on than the Circle F, just to get the record straight, do you have a recollection that there were other sheep that had a different brand than the Circle F?

A. Don't this right here, isn't that the 8 there?

Q. No, that is a Circle F.

A. Well this one before, that looks like the 8 and Circle F.

Q. Well, it looks to me like it was a figure that is crossed out, I don't know, we will have to——

A. Okay, well anyway, there was in that 1,085, there was branded with Circle F.

Q. But you don't know whether or not that part of your affidavit shows an 8 or not, you don't know?

(Testimony of Urban Landon.)

A. I couldn't swear it, it looks like and it looks like it has been crossed out, maybe the judge could——

Q. Whose handwriting is that in? [18]

A. Joe Mast's

Q. Does your initial appear there?

A. Right there.

Q. And this is the portion of the affidavit that is written in with pen, whereas the remainder of it is typewritten? A. That is right.

Mr. Galles: That is all.

Recross-Examination

By Mr. Jones:

Q. Mr. Landon, are these corners easy to identify up there? A. Yes, they are.

Q. Do you know how, how they are marked?

A. Well, a cornerstone is marked with a 1 and dash and 4, and the section corners is marked with a township and range whatever is on it, whatever one you find.

Q. And when you identify these, did you locate the corner section corner? A. Yes.

Q. Or was it the quarter corner?

A. Well, we found the section corners.

Q. Did you find any quarter corners?

A. Yes, there is several quarter corners over there.

Q. Did you locate the quarter corner of the Southeast Quarter of the Northeast Quarter of Section 36, or do you recall? [19]

(Testimony of Urban Landon.)

A. Well, I don't recall that, I don't recall it, but I am pretty sure that—I don't recall we ever found quarter corners or not.

Q. Well, other than this affidavit, could you testify whether you located the corner of Section 36, or not, Township 3 South, and Range 26 East?

A. Yes, I think we found them corners.

Q. Mr. Landon, were you present when this affidavit was made up or were you just present to sign it?

A. Well, I don't remember whether I was in the office that day or not, sometimes I was out and they would make these, they would take our notes and they would make—type it up, type up the affidavits when we would come in, we would have to sign them and they would hand them to us and we would read them and sign them in front of the forester.

Q. Do you know who gave the typist the information as to this affidavit?

A. He took it off our notes, that we took out in the field.

Q. Do you know whether or not these were—this affidavit was taken off your notes or not?

A. There was some of it, yes.

Mr. Jones: No further examination.

(There being no further examination, the witness was excused.) [20]

DALE J. BUXTON

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name?

A. Dale J. Buxton.

Q. Spell the last. A. B-u-x-t-o-n.

Q. Where do you live and what do you do?

A. Live in Billings, I work for the Bureau of Indian Affairs.

Q. Did you work for the Bureau of Indian Affairs in 1943? A. Yes.

Q. In what capacity?

A. Range conservationist.

Q Was that——

A. Detailed out of Billings, I worked out of the Regional Office.

Q. Out of the Regional Office? A. Yes.

Q. I will hand you an affidavit that purports to have your signature on it, that is attached to a motion for a preliminary injunction filed in this action, and ask you if your signature does appear on there?

A. Yes, right there, the last one.

Q. All right, I wonder if you would review just the 3rd, [21] 4th and 5th paragraphs and see if you have a recollection of having executed that affidavit?

A. Yes, after reading it over I do.

Q. Do you have a recollection now of whether the matters stated in there are true?

A. At the time it was written up, yes.

(Testimony of Dale J. Buxton.)

Q. You have no independent recollection now that those matters are true? A. Yes.

Q. Referring to the 4th paragraph, the end of which contains some handwriting or printing by ink, and referring also to Mr. Landon's testimony about the brands, do you know whether or not there were brands other than the Circle F on that 1,085 head of sheep, or can you tell from the affidavit?

A. Circle F is the only ones on that.

Q. That is the only brand, what about that little figure in the front of the Circle F, can you explain that?

A. He has got an 8 there, I don't remember whether that's—that was written in afterwards, it must be branded 8 and Circle F.

Q. Mr. Buxton, I have had two pieces of paper clipped together, marked Plaintiff's Exhibit 4, and ask you if your signature appears on either or both of those? A. Yes.

Q. Now, I will ask you to refer to the longer page, the second sheet, and ask you if that is the original [22] typewriting of the affidavit that you have been testifying from, which is attached to the motion? A. This is the original, I guess.

Q. Exhibit 4 is the original typewritten sheet of the affidavit attached to the motion?

A. That is right.

Q. Now, referring your attention again to the brand, Circle F, of the 1,085 head of sheep, can you state now whether there were sheep of that group that had other brands on?

(Testimony of Dale J. Buxton.)

A. According to this, Circle F is all I can go by.

Q. It shows the Circle F and no other brand on those 1,085 band? A. Circle F is all.

Q. Do you have any independent recollection of where the sheep were other than what is stated in the affidavit that you have in your hand?

A. No.

Q. Just whatever is there?

A. What is in there is all I can.

Q. You say it was a fact at the time you made it?

A. At the time we made the affidavit, yes.

Mr. Galles: That is all.

Cross-Examination

By Mr. Jones:

Q. In other words, you have no independent recollection of this transaction, whatever, other than what is in [23] this affidavit, is that right?

A. No, it is too long ago, I couldn't—at the time this affidavit was written, why it was right.

Q. Do you know who prepared this affidavit?

A. Joseph Mast typed it.

Q. And all you did is sign it, is that right?

A. Yes, well, I was there when he typed it of course.

Mr. Jones: That is all.

(There being no further questions, the witness was excused.) [24]

LESLIE W. WESTBERG

called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name?

A. Westberg, Leslie W. Westberg.

Q. Where do you live?

A. I am at Grass Range, Montana, at the present time.

Q. What do you do?

A. Well, I am working for a party by the name of Lawrence Nelson and Al Nelson.

Q. Al Nelson?

A. Six and a half miles south of Grass Range.

Q. Did you ever work for R. B. Fraser?

A. Yes, sir.

Q. That is the same man sitting in the courtroom here today? A. Yes, sir.

Q. When did you work for him?

A. Well, if I can remember right, I believe it was in '41, '42 and '43.

Q. What did you do for him?

A. Just herded the sheep, I was just a sheepherder.

Q. Were you employed by Mr. Fraser on December 31st, 1943?

A. On December 31st, 1943, no I wouldn't say for sure whether I was in '43 or not because you see I was [25] called in the service and I got discharged in '43.

(Testimony of Leslie W. Westberg.)

Q. What part of '43?

A. Well, I went in in '42 and I was discharged in '43.

Q. What part of '43?

A. In the spring of '43.

Q. And when you got discharged what did you do?

A. Well, I went back to work for Bob Fraser.

Q. That is the same man here? A. Yes.

Q. How long did you work for him when you came back from the service?

A. Until that fall.

Q. In the fall? A. Yes.

Q. Do you know what part of the fall?

A. Well, it was along about haying time.

Q. When would that be?

A. Well, along the late part of July or August.

Q. I see. When you worked for him during those months of 1943 did you herd sheep at that time for Mr. Fraser? A. Yes, sir.

Q. And were any of those sheep marked or branded? A. Yes, sir.

Q. With what brands? A. Circle F.

Q. Were those Mr. Fraser's sheep?

A. Yes, sir, all of them. [26]

Q. How do you know it was Circle F that they was branded?

A. Well, I will tell you, I was working for the same party that he bought the sheep from see, and when I moved the sheep down here, why I insisted to Mr. Fraser, about making the Circle F and put

(Testimony of Leslie W. Westberg.)

an F in the center for the brand, and he said that's just fine and dandy, I will just have that made and he went ahead and had it made and that's what he used all of the time.

Q. Did you do any of the branding yourself?

A. On some of them, I never branded them all, but I branded lots of them, branded lambs and branded old ones, too, after shearing.

Q. Were there any sheep that had a figure 8 or 1 plus on as far as you knew? A. No, sir.

Mr. Galles: You may examine.

Cross-Examination

By Mr. Jones:

Q. Mr Westberg, is Mr. Fraser the only one that owns sheep that you were herding in 1943?

A. Yes, sir, he was.

Q. Did anybody else have an interest in these sheep, to your knowledge?

A. None whatsoever as I know of.

Q. Did a man by the name of Jeffries from Joliet have [27] an interest?

A. Jeffries was my camp tender.

Mr. Galles: What?

A. Camp tender.

Mr. Jones: That is all.

(Testimony of Leslie W. Westberg.)

Redirect Examination

By Mr. Galles:

Q. When you say Jeffries was your camp tender, what do you mean? What did he do?

A. Well, like when you are out in the sheep wagon, see, there has got to be someone to bring you groceries and stuff like that, and bring out salt for the sheep. Well, that's what we call a camp tender, see. They are supposed to make a trip once a week with some grub or something like that, to see if the sheepherder wants anything; but lots of them, you know, they just let a sheepherder stay out there quite awhile whether he has got anything to eat or not.

Q. And do you know whether Jeffries owned any of these sheep you herded?

A. Jeffries didn't own any of them that I herded.

Mr. Galles: That is all.

Recross-Examination

By Mr. Jones:

Q. How did you know that Jeffries didn't own any of the sheep? [28]

A. Well, if he did own any of them I never did hear anything ever said, anything about that he did.

Q. Mr. Jeffries was your direct supervisor, is that right?

A. Just the camp tender, yes.

(Testimony of Leslie W. Westberg.)

Q. Wasn't he your only contact, between you and Mr. Fraser, while you were out there?

A. Yes, sir.

Q. And he give you instructions, is that right?

A. Well, he got his orders on what to do and if I needed any help he got that from Mr. Bob Fraser and then he would come out there and told me all about and move the camp or something. If I had to move the sheep and different range or something, you know, I got my instructions from him.

Mr. Jones: That is all.

Re-redirect Examination

By Mr. Galles:

Q. You had talked to Mr. Fraser though, while you worked for him?

A. Oh, yes; he come out several different times to the camp while I was herding sheep and visited me to see how I was getting along.

Mr. Galles: Thank you, that is all.

(There being no further questions, the witness was excused.) [29]

GORDON POWERS

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. Gordon Powers; I live at Crow Agency.

(Testimony of Gordon Powers.)

Q. What do you do there?

A. I am—my present title is Land Operations Officer.

Q. How long have you held that position?

A. Two years with that title. I have been at Crow, let's see, ten years last March. I came there the first of March, 1947.

Q. That is with the Crow Indian Agency?

A. Yes.

Q. How is that connected with the Bureau of Indian Affairs?

A. That is the reservation headquarters for the Bureau of Indian Affairs, to administer the Crow Indian Reservation.

Q. What are your present duties, Mr. Powers?

A. My present duties are to supervise the administration of the branch of land operations, includes range management, soil and moisture conservation and irrigation.

Q. There has been some reference here to permits and leases, does your office have anything to do with either or both of those?

A. My branch administers and is custodian of the records [30] of the grazing permits, not for leases.

Q. Would you tell us just how a grazing permit is distinguished from a lease so that we fully understand?

A. Well, a grazing permit is a revocable contract; it is to grant grazing privileges.

Mr. Jones: Your Honor, we will object to this

(Testimony of Gordon Powers.)

line of testimony and say that it is not the best evidence; this is an interpretation that he is giving now of an officer of the Indian Department, and I think the grazing permit itself is the best evidence of what kind of an instrument and what its legal effect is; that is our position.

The Court: Objection sustained.

Q. Mr. Powers, have you seen the complaint filed in this action or a copy of it? A. Yes.

Q. And are you familiar—what is attached to the complaint as Exhibit B; it is entitled "Grazing Permit"? A. Yes.

Q. Now that is what you refer to when you say a grazing permit; it is that type of contract or instrument? A. Yes. [31]

Q. Now, we refer to a lease between what parties are; is the lease entered into?

A. Well, a lease—there are two types of leases, lease contracts that are used by the Crow Indians. One is a competent lease, and the other type is termed "Office lease." It is a lease subject to the approval of the superintendent, this office lease I refer to. Those are the two types of leases that are used, and the parties——

Q. And the office lease is between one of the Indians and some other person?

A. The office lease is the contract between the Indian landowner and the lessee, whoever he may be, with approval of the superintendent to make it effective; it is negotiated or advertised for bid, either one, and, if it is negotiated, it is negotiated

(Testimony of Gordon Powers.)

between the Indian landowner himself and the prospective lessee, then it is not a valid contract without the approval and signature of the superintendent.

Q. Now when you say the Indian landowner, that means that he has title to the land?

A. He holds a trust title. It is a title of ownership subject to the trusteeship management of the United States Government.

Q. Is that what you would call restricted land?

A. That is right.

Q. Would that be the same as allotted land?

A. Yes. [32]

Q. All right now, a competent lease is between what type of owner and a third, another party?

A. The competent lease is negotiated by a Crow Indian or Indian owners, more than one, one or more, not to exceed five in number, who have been designated or declared competent under certain legislation, that gives this, which legislation places the responsibility for and privilege of negotiating a competent lease contract for agriculture or farming or grazing purposes, without the approval of the superintendent with whomever they may choose as lessee.

Q. That is because they are competent to handle their own affairs, I assume?

A. That is because they are eligible under the legislation to negotiate such a contract and they may not exceed five in number.

Q. Does that mean that they have a fee simple title to the land or is that likewise restricted land?

(Testimony of Gordon Powers.)

A. That is also under a trust restricted patent deed, trust deed, and it is known as restricted ownership.

Q. Mr. Powers, did you bring with you certain records of your office with reference to count one in the complaint that you say you are familiar, that is two bands of sheep, in connection with the notice and demand for payment of certain monies addressed [33] to R. B. Fraser?

A. Yes, sir; I have.

Q. Will you produce that record, please?

Mr. Jones: Your Honor, so I have it, our objection in reference to this goes to every witness' testimony.

The Court: That is correct, a continuing objection so the record may be clear, that the defendant has a continuing objection as to all witnesses with respect to any evidence on count one.

Q. What are you referring to now, Mr. Powers?

A. I am referring to a letter sent by registered mail.

Q. No, I mean what kind of record?

A. A carbon copy of correspondence retained in the office files.

Q. Is that part of the official records of your office? A. Yes, it is.

Q. Are you the custodian of this record?

A. Yes.

Q. I wonder if you could extract a carbon copy from your file and I will have it marked.

(Testimony of Gordon Powers.)

Mr. Jones: Well, your Honor, at this time we think that if they are going to submit, they should submit the whole record, rather than piecemeal.

Mr. Galles: We don't want to encumber the record and there are certain [34] things I don't think are relevant, our purpose is to show a demand for payment and failure to pay, in accordance with our allegations of count one of the dollar a head penalty as alleged.

The Court: I don't believe it is necessary to show the full record, if Mr. Jones wants to——

Mr. Galles: You can look at the whole record to see if there is anything else you want.

Mr. Jones: All right.

Q. I will hand you Plaintiff's Exhibit 5 and ask you again if this is part of your official records kept in the course of business of which you are the custodian? A. Yes.

Q. Will you state what it is?

A. It is a carbon copy of a letter sent by registered mail to R. B. Fraser, Billings Hudson Company, Billings, Montana.

Q. What is the date?

A. Dated January 17th, 1944, and signed with the signature of Robert Yellowtail, superintendent, this is a carbon copy.

Q. In the ordinary course of business, what happened to the original in your experience in your office? [35]

A. The original is the one which is mailed and dispatched to the recipient, the addressee.

(Testimony of Gordon Powers.)

Q. As part of Exhibit 5, is clipped a return receipt for registered mail, is that part of your file and records also, Mr. Powers? A. Yes.

Q. And does that show that Mr. Frazer received the original?

A. It was signed on January 20th, 1944, and the signature is J. G. Williams, who has signed as agent for the addressee.

Mr. Galles: We offer in evidence Plaintiff's Exhibit No. 5.

Mr. Jones: We will object on the grounds and for the reasons that it is not the best evidence and no proper foundation has been laid.

Mr. Galles: We will offer it as a business record, your Honor.

The Court: I think it is admissible as a business record under the Business Records Act, the objection is overruled and the Exhibit is received.

Q. Mr. Powers, did you make a search of your records to determine whether the payment demanded in Exhibit 5 had been made by Mr. Fraser or anyone else on his behalf? [36] A. Yes, I did.

Q. What did you find?

A. I found no evidence of any payment ever having been received by the agency office.

Q. Does that amount show on your records to be still due and owing?

A. Well, I don't know just how to answer that, the records don't show any evidence of payment having been received, and the record does show that there was a demand made which has been unfulfilled

(Testimony of Gordon Powers.)

so far as my official records are concerned, that action has never been satisfied or completed.

Q. Do you have in your office and among your records anything to show with reference to whether Mr. R. B. Fraser had the consent of any Indian or the tribe to have livestock on any of the lands alleged in the complaint? A. Yes, yes.

Q. What is that?

A. It will be necessary to explain how the basis upon which these grazing permits are issued, I think to show where the consent comes from, or lack of consent.

Q. All right, explain it as best that you think best?

A. Well the grazing permits are issued as a result of advertisement for competitive bid, covering certain designated lands for grazing purposes only, and [37] before those lands may be actually added or listed as a part of this grazing permit contract, the individual allotments, the owners of these individual allotments must sign a simple power of attorney, identified as a form by the form authority to grant grazing privileges, and that power of attorney authorizing the superintendent to grant these grazing privileges under a grazing permit according to the Code of Federal Regulations, for grazing purposes only, and then the superintendent acts in behalf of the allottee land owner and proceeds to advertise the permit and the advertisement so stipulates that any lands eligible at the time of advertisement or becoming eligible after the advertisement

(Testimony of Gordon Powers.)

during the five year period of the contract, may be added and become a part of that grazing permit, and it is with the consent of the Indian allottee, through this power of attorney, that power of attorney gives their consent to the superintendent to contract the land under a grazing permit. Now these lands on which the complaint alleges trespass are, or were, lands listed and contracted under a grazing permit under that system I just outlined.

Q. And the superintendent would be the one who would give permission or deny permission for anyone to have cattle on land other than where he had a [38] permit, lease or owned it?

A. Yes, that is true.

Q. Can you find any record of such consent or permission having been given to R. B. Fraser for any of the lands or alleged trespasses described in the complaint? A. No.

Q. Mr. Powers, referring to your affidavit which is attached to the motion for preliminary injunction on file herein, I will hand you that and ask you if that is your affidavit? A. Yes, it is.

Q. I might state, for the record, I am now proceeding to the evidence on count two with this witness. That is specifically with reference to the trespass, his other testimony heretofore having been for all counts as it may pertain. Referring to page three of your affidavit I will ask you to glance at that and see if that refreshes your memory as to what you did on February 12th and 13th, 1952?

A. It does.

(Testimony of Gordon Powers.)

Q. Would you state what you did on that day, whom you were with and what you did and saw?

A. On February 12th, I received a call from Mr. Joe Cormier, who advised me that there——

Q. Just a minute, you can't say what anyone else told you, you can say what you did and what happened [39] as a result of that call?

A. On February 12th I drove alone to what is known as Range Unit No. 22, which is under grazing permit to the Cormier brothers. Upon arrival at this Range Unit No. 22, I met Mr. Clem Cormier, and Mr. Almond Hall, who was on that date a state brand inspector. And we drove into the range unit itself, and we met Mr. Joe Cormier and a cowboy named Albert Newman, who, those two individuals were on horseback, and as we were talking as a group, a man who identified himself in answer to my question as Mr. Roy McGarry drove up. He was in a four-wheeled drive surplus military vehicle and Mr. McGarry in response to my questions advised me——

Mr. Jones: Just a minute, to which we object if he is going to testify as to what Mr. McGarry said, we will object to it on the grounds it is hearsay.

The Court: Will you confine just to what you did.

Q. Just a minute, Mr. Powers, I wonder if I could confer with Mr. Jones.

The Court: Well, it is about time for a recess.

(Testimony of Gordon Powers.)

(Whereupon a recess was here taken; court resumed pursuant to recess, parties present the same as before. Mr. Powers [40] resumed the witness stand for further direct examination by Mr. Galles as follows:)

Q. Mr. Powers, I think you had gotten down to the point where you saw Mr. McGarry, what did you do then?

A. Well, after we had, the group of us had discussed what our plans were, we drove over two or three allotments that were part of the grazing unit permit, two in favor of the Cormier brothers, and I had aerial photos, I identified the land which we were traveling over, and counted the livestock that I saw who were located on the stretch of land that I identified by the aerial photographs. I checked all of the brands on those I could get right close to and see readily, you understand this was in the winter time and the hair was quite long, but several of the cattle had been recently branded and some of the older cows had such large brands that they were very easy to identify as VC—let me refer—that is the right ribs.

Q. How many cattle did you find?

A. I counted a total of 84, there were 82 cows and 2 steers, the cows, there was no brand on any of the cows that I could identify other than VC brand on the right ribs, the two steers had a brand LB connected on their right ribs. [41]

Q. Now this VC and LB brands how were they

(Testimony of Gordon Powers.)

arranged, the letters? A. Well, the VC——

Q. Was that arranged the same as you have it on your affidavit on page 3?

A. Yes, and so is the LB, it is, if you would like me to try to identify how that is, how the brands are tied I will, but——

Q. No, I think that is sufficient, Mr. Powers, this was on February 13th, 1952? A. Yes.

Q. And on what lands did you find these cattle, can you step to Exhibit 1 and point out where you found the cattle?

A. Yes. I counted 49 cows on the north half of the southeast quarter of section 33, township 3 South, range 46 East.

Q. Is that marked on Exhibit 1?

A. Yes it is, in red.

Q. It is marked in red?

A. And I counted 33 cows and 2 steers on Lot 2 of section 4, township 4 South, range 26 East, that is also marked in red on this map.

Q. And I notice the date, written in ink between the two red areas you have identified as 2/13/52, does that stand for February 13th, 1952?

A. Yes, that is the date on which this action I have [42] described occurred.

Q. Do you have in your records which you brought with you a copy of a demand letter for payment that was sent to R. B. Fraser?

A. Yes, I do.

Q. Will you extract that, please.

A. This is the document.

(Testimony of Gordon Powers.)

Q. Is that part of your official files and records kept in the ordinary course of business of which you are the custodian? A. Yes, it is.

Q. I have identified the document marked Plaintiff's Exhibit No. 6 and ask you to state what it is please?

A. Well, this is a carbon copy of the letter sent by registered mail to R. B. Fraser, Billings Hudson Company, Billings, Montana, dated February 15th, 1952, typed for the signature of L. C. Lippert, superintendent.

Q. And I notice on the document it says, 'return receipt requested,' do you have such a return receipt?

A. No, that is not with these records, that was attached to records that had been referred or transmitted to the area office for the reference on through channels for their records, I don't have it attached to mine. [43]

Q. Attached to this exhibit is a receipt for registered article, what does that show?

A. That shows, that is a receipt issued by the post office for their acceptance for mailing purposes of this registered letter, it is——

Q. In the ordinary course of business, what would have happened to the original letter?

A. It would have been mailed to the addressee, Mr. R. B. Fraser.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit No. 6.

Mr. Jones: We have no objection to the Exhibit

(Testimony of Gordon Powers.)

for the sole purpose for what it is in for, demand.

The Court: I presume that is all it is offered for. The Exhibit will be received.

Q. Mr. Powers, do your records show that the money demand made in Exhibit 6 has been paid by Mr. Fraser or anyone on his behalf?

A. No, the records show no evidence of any kind of payment having been received by the office.

Q. Will you please refer to your affidavit attached to the motion for preliminary injunction at the bottom of page 4, I might state for the court that we are now proceeding to count three. I will ask you if on January 5th, 1955, you did anything with reference to cattle and counting cattle? [44]

A. Yes, I did.

Q. What did you do?

A. January 5th, 1955, I drove from the agency to what is known as Range Unit No. 19, which was permitted under the grazing unit permit to the Cormier brothers at that time, and I entered the range unit about 10 o'clock in the morning and counted; I observed twenty head of horses grazing on an allotment that I identified from aerial photographs again, as the northeast to the southeast quarter of section 27, township 1 south, range 27 east, and after having counted those twenty head of horses I proceeded on through the range unit No. 19, and observed a bunch of cattle grazing on what I identified from the aerial photograph as the north half of section 27, township 1 south, range 27 east.

Q. Did you say how many cattle?

(Testimony of Gordon Powers.)

A. No I didn't, just a bunch of cattle, so I drove on closer to this bunch of cattle, and as I was driving towards the cattle I observed a horseman, a cowboy riding a small sorrel horse with four white socks, and white blaze in his face, you might think that was funny but he was riding away from me and I saw the blaze on his face anyway, I had my binoculars with me and of course I tried to see, it was quite a ways away, so I tried to see if I could recognize the individual on the horse, which I could not, but as I was observing the horse riding away from me, [45] the cowboy stopped and as they were stopped, the horse swung his head around so I could see the blaze in his face on off out of that area, and as I continued then into the bunch of cattle, and they were quite gentle cattle, they were all good looking young heifer cattle, looked to me like they could be registered cattle, they were of that appearance and I couldn't find any brand anywhere and I had the binoculars of course in use and couldn't find any ear tag which, which sometimes you find on registered animals, and I couldn't identify or observe any horn marking or brand either, so I was not able to identify any markings on these young heifers, so I counted them, it was easy to drive right through all of them and I counted 42 head, all on this area I have already described. After I got through counting them, I drove over the rest of the area that was under permit to Cormier brothers, in this range unit 19, and I observed many bed grounds that had been recently used on this permitted land,

(Testimony of Gordon Powers.)

those bed grounds were very, very obvious, scattered throughout this local area. After I left this—well, after I got through counting the cattle, I went on through the range unit and went to the Pryor Creek blacktop highway, along Pryor Creek, and that was just downstream, down to the north of range unit 19, I proceeded on up the highway northward toward the town [46] of Pryor, and as I drove past the cow camp, that from to my knowledge has been used for many years by R. B. Fraser and his livestock operations, for a cow camp headquarters, I observed this same sorrel horse in the corral right off the highway, and a man, well there were two men in the yard, around this cow camp, I drove on by, to conduct some more livestock counting business, over on Sage Creek. And then I returned in the late afternoon, and returned through this same area and and went back to Crow Agency.

Q. Did you make a determination of the ownership of these 42 head?

A. Well, I attempted to, not having any brands to go by, but all I could—the best I could do was to consult the individual that I had seen on this sorrel horse, and all I know is what he told me.

Q. Does your record show that any demand was made for payment of these 42 cattle?

A. Yes, it does.

Q. Will you produce that?

A. I think I will just pull that——

Q. I have had the documents you handed me,

(Testimony of Gordon Powers.)

marked Plaintiff's Exhibit 7 and ask you if these are part of your official files and records kept in the ordinary course of business, of which you are the custodian? [47] A. Yes, they are.

Q. Will you state what those documents consist of?

A. These are two identical carbon copies of a letter sent by registered mail addressed to R. B. Fraser, 2015 First Avenue North, Billings, Montana, dated January 10th, 1955, typed for the signature of L. C. Lippert, superintendent of the Crow Indian Agency.

Q. How about the smaller papers attached?

A. On one of these carbon copies is a receipt for registered article, post office receipt, signifying receipt of this letter for mailing purposes, and to the other carbon copy is attached a return receipt, and this return receipt was signed January 12th, 1955, by Don W. Scott, as agent for the addressee.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit No. 7.

Mr. Jones: We will object to it on the grounds it is incompetent and irrelevant; I might say that insofar as the demand is concerned, I don't believe any demand is necessary, your Honor.

The Court: Objection overruled and the exhibit may be received.

Q. Does your record show whether the $42.00 demanded in Exhibit 7 has been paid by the defendants or any of them or anyone on their behalf?

A. No, the records do not show any evidence of

(Testimony of Gordon Powers.)

any [48] payment of that $42.00 ever having been paid.

Q. Referring now to page 7 of your affidavit attached to the motion for preliminary injunction, calling your attention to July 8th, 1955, did you observe any livestock in the course of your official duties on that day?

A. Yes, I did, I drove to Range Unit No. 19 on July 8th, 1955, and that range unit being under a grazing permit to the Cormier brothers, at about 7:30 or 7:45 that morning on July 8th, I entered the range unit and mounted a horse that had been left there at the fence line for me to use and rode on into the range unit, and as I was riding into the range unit I observed several riders to the southeast of me, about a mile or so, and I rode out to meet them and they were bringing a herd of horses towards me, and I joined them and I helped to hold this herd of horses in a fence corner, located on lot 5, section 21, township 1 south, range 27 east, and there were present Joe Cormier, Clem Cormier, Pat Cormier, and a cowboy introduced to me as George. These individuals held these horses in this fence corner while I attempted to identify the brands of these horses. With the help of these cowboys, I managed to identify twenty-one, well let me check this affidavit just a moment—eighteen horses and three mules, there were twenty-one animals altogether. These animals had [49] various brands that are as shown on this affidavit that I am referring to.

Q. I wonder if we might stipulate that the de-

(Testimony of Gordon Powers.)

scription of the horses or mules with the brands as appearing on the bottom portion of page 7 in the witness' affidavit might be incorporated into the record rather than having to read it all?

Mr. Jones: In other words, he will testify to that is what he saw?

Mr. Galles: Those are the animals he saw and the brands he observed, is that correct?

A. Yes, that is correct.

Mr. Jones: No objection.

The Court: It is the court's understanding that this will be incorporated into the record, the reference to the description on page 7, is it?

Mr. Galles: The bottom portion of page 7 described mules and horses and the brands found thereon.

The Court: That will be incorporated into the record as the testimony of this witness.

A. Do you wish me to continue with what I did that day?

Q. Yes. A. After we—— [50]

Q. Wait a minute, does that total three mules and eighteen horses, the description that we stipulated into the record? A. Yes, that is——

Q. I think that is sufficient, Mr. Powers, I think you have said when, where and identified the livestock.

A. Well, I had to identify the land on which these horses had come.

Mr. Jones: We are going to object, your Honor, to any testimony in reference to where these animals

(Testimony of Gordon Powers.)

were picked up for the reason that in the affidavit, shows that this witness does not know where they were picked up, he was not present at the time, he only saw them when they were over here in this corner, I don't think he can testify to that, it is hearsay.

Mr. Galles: Well, let me see, I don't know——

Q. Do you know where these animals and horses were found before they were driven to the corner of the fence you have described? A. No, I don't.

Q. Somebody else told you?

A. Yes, I was shown the location, I know the land, identified the land on which the horses were when I first saw them. [51]

The Court: Well you have already described, that is lot 5.

A. No, your Honor, that was where we ended up with the horses, but——

Q. Well, lot 5 is where you drove them into the corner? A. And counted them, yes.

Q. That is not where they were found grazing and——

A. Lot 5 is not where I first saw them, and I don't know whether that is where anyone else saw them or not.

Q. Now, referring to the past page of your affidavit, page 8, did you observe some cattle in the course of your official duties on July 28th?

A. Yes.

Q. Do you have records with you showing that a demand was made for payment of livestock, addressed to R. B. Fraser, with reference to the July 8th count that you made? A. Yes, I do.

(Testimony of Gordon Powers.)

Q. I am trying to go too fast I guess.

A. I didn't point it out on the map, the location of those 42 head.

Q. I have had the document you handed me marked Plaintiff's Exhibit 8, and ask you if this is part of your official files and records kept in the ordinary course of business of which you are the custodian? [52] A. Yes.

Q. Will you state what it is please, what they are?

A. It is a carbon copy of the letter sent by registered mail addressed to R. B. Fraser, 2015 First Avenue North, Billings, Montana, dated July 14th, 1955, typed for the signature of L. C. Lippert, superintendent, and it also—this document is supported by a receipt for registered article from the Crow Agency post office, and that registered article was this letter, and also has a return receipt signed with date of delivery, July 15th, 1955, bearing the signature of Wayne Devons, it is difficult to read, but it looks like it is D-e-v-o-n-s, and that is the signature signed as an agent for the addressee.

Q. R. B. Fraser's name appears on this registered return receipt? A. Yes.

Q. However—— A. Yes, it does.

Mr. Galles: The Government offers in evidence Plaintiff's Exhibit No. 8.

Mr. Jones: We will object to Plaintiff's Exhibit No. 8 on the grounds and for the reasons that no proper foundation has been laid, it is incompetent, irrelevant and immaterial.

(Testimony of Gordon Powers.)

The Court: Objection overruled, the Exhibit will be received. [53]

Q. Do your records show whether or not payment has been made pursuant to the demand contained in Exhibit No. 8, payment by R. B. Fraser or anyone else on his behalf?

A. The records don't show any payment ever having been received by the agency.

Q. Now referring to page 8 of your affidavit, did you make a count of livestock in the course of your official duties on July 28th, 1955?

A. Yes, I did.

Q. Will you describe what you did and saw?

A. Well, I entered this range unit number 19, which was under grazing permit to the Cormier brothers, on July 28th, around 11:00 a.m., and I went, I drove through the land under grazing permit and counted eight cows and three calves, all of which were branded VC on the right ribs. These eleven animals were located on the north half of section 27, township 1 south, range 27 east, and I identified that land by use of aerial photographs, and I continued on through the range unit and I again counted eighteen horses and three mules on the northeast quarter of section 22, township 1 south, range 27 east. These horses were quite wild and naturally I was in a jeep and I wasn't able to proceed—get anywhere near close enough to actually read any brands, but I had seen these individual horses and [54] mules on numerous occasions, and several of them I could positively tell as being the same animals that I had seen time after time, you

(Testimony of Gordon Powers.)

get to know these animals when you see them after quite a few times.

Q. Were these the same ones you saw on July 8th, 1955?

A. Yes, in my opinion they were identical to the same horses that I had actually counted the brands on, on January 5th, I would not say that they were all, I wouldn't be able to say that they were all the same animals, but there were numerous animals in this herd that certainly looked to me to be the same identical animals that had been in the herd that I had counted previous to this.

Q. I wonder if you would step to Exhibit No. 1 and point out to the court where you found the eight cows and three calves, branded VC, on July 28th, 1955?

A. They were on the land I have already described, but it is in red, it is the north half of section 27, township 1 south, range 27 east, colored in red on this map, with the date on there of 7/28/55.

Q. I notice some other dates, what is it, January 1, 19—January 5, 1955, now that refers to I think count three, and is that where you found the 42 cattle you testified to?

A. Yes, that is the same ownership of land, same [55] allotment and description.

Q. I wonder for the convenience of the court if you would mark with Roman numerals on Exhibit No. 1 not that you saw them there, but just mark the Exhibit for the assistance of the court where Mr. Landon and Mr. Buxton saw the sheep that they refer to; you heard their testimony?

(Testimony of Gordon Powers.)

A. Yes, I did.

Q. Will you mark a large Roman numeral one besides each of those places they testified too, please? A. Is that adequate?

Q. Yes, and then with reference to count two, where you saw the 82 cows and 2 steers on February 13th, 1952, will you put a Roman numeral two at that point? A. (Witness complying.)

Q. And likewise where you saw the 42 head of cattle in count three, on January 5th, 1955, will you place a Roman numeral three?

A. (Witness complying.)

Q. And what is marked on the Exhibit as July 8th, 1955, will you put a Roman numeral four, please? A. (Witness complying.)

Q. And finally, where you saw 8 cows and 3 calves on July 28th, 1955, put a Roman numeral five.

A. (Witness complying.)

Q. Now, so the record may be straight, it is not where [56] the Roman numerals are, but it is the red marking on the Exhibit identified by Roman numerals adjacent thereto. A. (No reply.)

(Whereupon the court then recessed for noon; court resumed pursuant to recess at 2:00 o'clock p.m., parties present the same as before.)

(Mr. Gordon Powers resumed the witness stand for further direct examination by Mr. Galles, as follows:)

Q. Mr. Powers, I will hand you Plaintiff's Exhibit No. 2 which has been received in evidence by

(Testimony of Gordon Powers.)

stipulation, and ask you if you prepared that document? A. Yes, I did.

Q. And will you explain what it portrays, please?

A. It portrays the unit boundary for range unit number 22, as of March 5th, 1952. It also indicates the range unit number 22 boundary that was in effect during the five-year permit period, December 1st, 1945, through November 30th of 1950.

Q. That is indicated by a different colored boundaries with the legend that will indicate what you have just said?

A. Yes, and within those boundaries as indicated, are also colors representing the different types of land use control, the green color, would you like me to identify the legend with what the map shows? [57]

Q. Well, does the legend reveal what you were about to say?

A. Yes, I have already stated that, that the colors represent the different types of land use control within these boundaries.

Q. Now you say that there are two five-year periods covered from '45 to '50? A. Yes.

Q. And '50 to '55?

A. Yes, those two five-year contract periods.

Q. Now you mentioned, some date in between, I think you said 1952?

A. That legend, this legend and the unit boundary, the legend on land use control was in effect at the time, on March 5th, 1952.

(Testimony of Gordon Powers.)

Q. How about the land generally within the boundaries indicated by the two five-year periods, was that disregarding the land use control, do those accurately describe the two units for the various five year periods indicated, if I make myself clear?

A. Those unit boundaries for the two different five-year periods enclose these various tracts of land, but the status of control did not remain the same for all of the duration of both of those five-year periods.

Q. I see; now this, you say, is range unit number 22? A. Yes. [58]

Q. When you say range unit number 22, what do you mean, is that parcel of land that is permitted to some particular person?

A. Yes, that is the number identity given to the land included in the grazing permit issued to the Cormier brothers. I should state that that is the identity of the unit number, that was permitted to the Cormier brothers for grazing purposes.

Q. I see, so that during the two five-year periods indicated on Exhibit No. 2, this range unit number 2, whether the former or latter five-year period, was during that ten permitted to the Cormier brothers?

A. Yes, under that number 22.

Q. Under number 22? A. Yes.

Q. Did R. B. Fraser have anything to do with range unit number 22? A. No.

Q. Now I will ask you, I will hand you Plaintiff's Exhibit No. 3 and ask you if you prepared that document?

(Testimony of Gordon Powers.)

A. No, I did not prepare this document.

Q. Are you familiar with it?

A. Yes, I am.

Q. What does it portray?

A. It portrays the land enclosed within the boundaries [59] of range unit number 19, and some portions of adjacent lands outside of the unit boundary of unit number 19.

Q. Who has range unit number 19 under permit?

A. At the present time it is permitted to the Cormier brothers.

Q. And who had it prior to that time?

A. Up to December 31st, 1954, and for two contract periods at least prior to that date, it was permitted to R. B. Fraser. Since December 1st, December 31st, 1954, I should say, since January 1st, 1955, it has been permitted to the Cormier brothers.

Q. Now you mentioned some land outside of the unit, what kind of land is that and who has control of it, if you know?

A. Those lands portrayed here outside of the range unit boundary are controlled either by fee patent or by competent lease or by office approved lease, and if I can identify the control, it is listed by the legend on those lands.

Q. The legend states who had the lease or the deed outside of the range unit? A. Yes.

Q. And in each case is it to the same person?

A. No, to various persons.

Q. I see, but the Exhibit explains who has the control [60] of those various ones? A. Yes.

(Testimony of Gordon Powers.)

Q. Now, Mr. Powers, proceeding to count six of the complaint I will ask you to refer to your affidavit attached to the motion for preliminary injunction and to the first page thereof?

A. I don't have that.

Q. I am sorry; did you in the course of your official duties on January 31st, 1952, make a live-stock count in connection with this case?

A. Yes, I did.

Q. Will you state what you did and what you found?

A. On January 31st, 1952, I drove to range unit number 22, arriving shortly after 8 o'clock in the morning, and upon my arrival I met Joe and Clem Cormier who were on horseback. I talked with them a few moments and proceeded in along to the unit by jeep and the Cormier's remained on horseback.

Q. Now which unit is that?

A. Range unit number 22.

Q. Permitted to whom?

A. Permitted to the Cormier brothers.

Q. All right.

A. I had aerial photographs and I identified land control so I would know what allotments I was on, and I counted 27 cattle branded VC on the right ribs, on the southwest quarter of section 33, [61] township 3 south, range 26 east. This affidavit lists range 27 east, but that is a typographical error, it should be range 26 east, and I further counted 28 cattle branded with a VC right ribs, and also a brand

(Testimony of Gordon Powers.)

identified as [2] on the right ribs, grazing on lots 2 and 3 in section 31, township 3 south, range 26 east.

Q. I wonder if you would step to Exhibit No. 1 and identify where you found those two sets of cattle? A. (Witness complying.)

Q. Is that marked in red?

A. No, it is not.

Q. I wonder if you would take my pen and mark on Exhibit 1 where you found the 27 cattle branded VC on the right ribs.

The Court: What identification marks are you using there?

Q. Well, I will have him put it in there.

A. Shall I color that solidly or cross-hatch it or——

Q. Why don't you cross-hatch the land description that you have recited on which you found these cattle? A. (Witness complying.)

Q. And then above it, will you write Roman numeral six and put the date on which you found these cattle?

A. Roman numeral number seven?

Q. Roman numeral number six.

A. (Inaudible.) [62]

Q. Would you indicate in the same manner where you found the 28 head of cattle branded VC or [2] on the right ribs?

A. I will have to consult my plat book now to see the location of those lots in that quarter section.

Q. Now you have marked out an area and cross-hatched it where you found the 28 head of cattle,

(Testimony of Gordon Powers.)

is that right? A. Yes.

Q. Now will you put also the Roman numeral six and the date on which you observed those cattle?

A. (Witness complying.)

Q. Now in searching your records did you determine who had the permit or other right of possession of the land you have marked on Exhibit 1 just now? A. Yes, I did.

Q. Who had that?

A. It was under grazing permit to the Cormier brothers.

Q. Was a similar registered letter sent to R. B. Fraser in connection with the cattle you have just described?

A. No, no there was no demand made.

Mr. Galles: And I might state the Government is not claiming any monetary recovery on that.

Q. Referring to page two of your affidavit, did you on February 4th, 1952, have an occasion to make a [63] livestock count in connection with this case?

A. Yes, I did.

Q. Will you describe what you did?

A. On February 4th, 1952, I again entered range unit number 22 under permit to the Cormier brothers, and identified the land on which I was located, and I counted 73 cows branded VC right ribs, or [2] on the right ribs, on the southwest quarter of section 33, township 3 south, range 26 east again, rather than 27 east as it says in this affidavit.

Q. That should be on 26 east?

A. Yes, it should.

(Testimony of Gordon Powers.)

Q. Did you see any other cattle at that time or place?

A. Yes, I did, I also counted 136 steers, I couldn't identify any brand on these steers, but they were—they all had their tails bobbed, the brush of their tail had been bobbed off, and——

Q. Will you step to Exhibit No. 1 and mark in with a cross-hatching, going the other direction, on the Exhibit, where you found the 73 head of cattle.

A. (Witness complying.)

Q. Now will you write in the date on which you observed these cattle and put the Roman numeral six beside it?

A. Roman numeral number seven.

Q. Number six, this is still count six.

A. (Witness complying.)

Q. Thank you. Did you bring with you at my request the [64] office copy in your office of what is attached to the complaint as Exhibit B with the various attachments? A. Yes, I did.

Q. Will you produce that please, may I have it for marking?

A. (Witness taking document out of file.)

Q. Is this Plaintiff's Exhibit No. 9 which you have handed me and I have had marked, part of the official files and records of your office kept in the ordinary course of business and of which you are the custodian? A. Yes.

Q. Will you state what it is please?

A. It is a copy of original grazing permit with its supporting modification, grazing stipulations,

(Testimony of Gordon Powers.)

land schedules, bond, performance of bond the pledge, and certificate of award that was issued in the name of R. B. Fraser, 106 Clark Avenue, Billings, Montana.

Q. Are there signatures affixed to the grazing permit? A. Yes, there are.

Q. Is there a signature that purports to be R. B. Fraser's affixed? A. Yes.

Q. And other original signatures?

A. Yes.

Q. Do you know where the original typewritten document is? [65]

A. I, I am certain that it would be in the general accounting office in Washington, because at that time we were sending all originals of our grazing contracts, permit contracts to the general accounting office for filing.

Q. Can you state that the exhibit you hold in your hand is an accurate, what you might call a duplicate original of what was the original typewritten grazing permit?

A. Yes, this is.

Q. Is this part of your official files and records as it exists? A. Yes.

Q. And no changes have been made in it since it was executed? A. No.

Q. That it is now in the same condition as it was when it was executed? A. That's correct.

Mr. Galles: Offer in evidence Plaintiff's Exhibit No. 9.

Mr. Jones: No objection.

(Testimony of Gordon Powers.)

The Court: Plaintiff's Exhibit 9 may be received.

Q. Now, Mr. Powers, I am going to hand this motion back to you with your affidavit affixed, and will you refer to page 4 of your affidavit please? [66]

A. (Witness complying.)

Q. Did you on November 4, 1954, make a livestock count in connection with Exhibit 9, and this case? A. Yes, I did.

Q. Would you state what you did and found?

A. Well, on November 4th, 1954, in the company of Range Management Assistant, C. R. Pilgeram, I entered range unit number 19, that was permitted to Mr. R. B. Fraser at that time, and counted all of the livestock that I could conveniently locate from jeep travel, and I counted 196 cattle, 95 calves besides these 196 mature animals, and 17 horses, all grazing within the exterior boundaries of range unit number 19.

Q. Now, is that the same land that was permitted to Mr. Fraser under Exhibit 9 that you have just identified?

A. Yes, that is that small map, Exhibit 9, excuse me I would like to be——

Q. No, I was referring to this Exhibit?

A. The contract.

Q. The contract?

A. Yes. Yes, those are the lands that are covered by that grazing permit contract, that is where I found these cattle on lands——

Q. And is also described in Exhibit No. 3?

(Testimony of Gordon Powers.)

A. I would like to study this just for a moment to be sure of this legend, yes, it is also, this is the [67] land covered in the grazing permit contract itself.

Q. Which is Exhibit 9?

A. Which is Exhibit 9, on which I found, I counted these cattle on November 4th, cattle and horses, as I identified as being permitted to R. B. Fraser on that date, on this Exhibit No. 3.

Q. Did you identify this ewestock—you just referred to by brand?

A. Yes, the brands I observed were VC on the right ribs and circle Y, that is a Y enclosed within a circle on the left ribs, and circle H, which is an H enclosed within a circle on the left shoulder, and the horses were so wild I was not able to get close enough to determine any brands.

Q. Now, Mr. Powers, in Exhibit 9, does it provide for a certain number of livestock or animal units or whatever you want to call it, to be grazed in accordance with that contract?

A. Yes, it stipulates the maximum number of animal units or cattle as a class of livestock that can be grazed within, on the lands described in this Exhibit No. 9.

Q. Now will you refer to 9 and tell us how many cattle or other units were permitted at the time that you observed these heifer cattle on November 4th, 1954?

A. On November 4th, 1954, the grazing permit contract stipulates the maximum number of cattle

(Testimony of Gordon Powers.)

to be grazed, [68] is 41 cattle—no, let me restate that again, a total of 123 cattle, for year long grazing, that is twelve months' use in the year, and that 123 cattle is broken down to a stocking of 82 cattle for 12 months' year long use, on what we call the permitted land, that is non-competent owned, that the superintendent permits for the Indian owner under the power of attorney entitled 'Authority to Grant Grazing Privileges'. The balance of the 123 head or 41 cattle for year long use represents the maximum stock to be grazed upon what is termed as on and off grazing privileges, under the grazing permit. Now that on and off stocking is based upon the carrying capacity of the range land controlled by the permittee, independently of the Crow Indian office. In this case, it is comprised of competent lease land and fee patent deeded land, and the permittee grazes. the permittee voluntarily offers that for an on and off use, to be used in common and concurrently with the permitted land as one operation.

Q. Now it is alleged in the complaint that there was 196 head of cattle, is that—and that is what you testified to? A. Yes.

Q. And seventeen head of horses? A. Yes.

Q. In the complaint it does not say anything about the [69] 95 calves, do you count those in computing your carrying capacity?

A. No, we do not, anything under weaning age, we do not count against the stocking rates.

Q. Now, is there a difference between horses and cattle as far as the permitted carrying capacity of this particular land is concerned?

(Testimony of Gordon Powers.)

A. Yes, there is, the horses are computed at the rate of two horses equivalent to three cattle for animal unit determination.

Q. Is that by custom, or is it specified in the contract, or——

A. That is the administrative determination of equivalent ratio between cattle and horses for this Billings area within the Indian Service.

Q. That is universally accepted in the livestock business also, isn't it?

A. Yes, it is universally accepted by all of the permittees that do business with the Indian Service on the Crow Reservation.

Q. Just out of curiosity, do sheep convert to a different ratio?

A. Yes, they are converted at the rate of four sheep equivalent to one cow.

Q. Now, as a result of the contract and the number of cattle and horses you found on November 4th, 1954, on the permitted land described on Exhibit 9, can [70] you calculate the number of cow units that were in excess that the contract permitted?

A. Well, I have already calculated it. Would you like to have me calculate it again or just give you the figures?

Q. Explain how you did it and then your result?

A. Well, of course, the 196 cattle represent 196 animal units for stocking computation. The seventeen horses must be converted to cow units by the ratio of two horses to three cattle, that is of course

(Testimony of Gordon Powers.)

the same as one and a half horses equal one cow, so if we take a half of seventeen, which comes to eight and a half, and you can't split the animal, so you would have to go to, you would have to add eight and nine, let's see, that would be twenty-three, that would be sixteen, six, you would have to take nine more animal units to add to these seventeen horses to make that equivalent of one and a half horses to one cow, which would give you a total of twenty-six cow units then.

Q. Seventeen horses equal twenty-six cow units?

A. Twenty-six cow units, you add the twenty-six cow units to the 196 cattle, and I hope I get what I want.

The Court: I think you will have to make it eight instead of nine.

A. That is right, we dropped the half in this case, [71] we made it eight instead of nine, and you can't cut one of them in two, so we come up with a total of 221 cow units, exclusive of calves of course, they are not counted.

Q. Then in arriving at the 98 cow units alleged in the complaint, in excess of the number authorized and permitted, you deduct the 123 from the 221, coming up with 98? A. Yes, that is right.

Q. Now we have alleged in our complaint, that the sum of $2,466.66 is due; how do we arrive at that?

A. Well, I have a document that has those figures on it, but we arrive at that by the penalty stipulated in our regulations for overstocking authorized permitted stocking.

(Testimony of Gordon Powers.)

Q. Is that a part of Exhibit 9 that you have identified and has been received, that is the regulations?

A. Yes, it is stipulated in that contract, grazing permit contract, do I have it here, yes I have it here, I would like a moment to refer to another one of my records here in this——

Q. Well, it is a mathematical computation, is it not, Mr. Powers? A. Yes, it is.

Q. And when you refer to the stipulations, I have in my hand Exhibit 9, you refer to what is the printed paper, entitled 'Range Control Stipulation'? [72] A. Yes.

Q. And particularly to paragraph 3, I believe?

A. Yes, that is the one.

Q. And will you explain just how that amount of money that is claimed to be due is figured?

A. It is paid on a one and a half times the regular rate per head that is charged under the face of the grazing permit for all livestock or animal units in excess of that which is stipulated by the grazing permit.

Q. In other words, you take 98 animal units, multiply it by one and a half times the rate per head agreed upon in Exhibit 9? A. Yes.

Q. For each animal in excess—and that is the multiplication process you go through?

A. Yes.

Q. Now, will you state what the rate per animal unit is in the contract as portrayed by Exhibit 9?

(Testimony of Gordon Powers.)

A. The rate per head stipulated was $16.778 per head, per season, that is for the year long use.

Q. Now, that is in the original contract, did the modification that is attached and made a part of Exhibit 9 change that in any way?

A. No, it did not change the rate per head.

Q. That remains the same?

A. Yes, it does. [73]

Q. What did the modification do, incidentally, to the original contract?

A. It removed 40 acres of land from Mr. Fraser's grazing permit, because that 40 acre tract had been sold to a non-Indian, and a fee patent issued which removed, which converted it from restrictive status to a fee patent status.

Q. And by doing that, did it reduce the number of animals that he was authorized to have on the—under the contract? A. Yes, it did.

Q. By how many? A. One animal unit.

Q. And it reduced it from what to what?

A. From 83 head to 82 head for year long grazing on the permitted land, and the total including the on and off carrying capacity, reduced from 124 to 123 cattle year long use.

Q. When you were testifying before, you did use the modified figures as reduced by the modification?

A. Yes, in these, in the maximum animal units that were authorized to graze, yes, because that modification was effective back in 1951, I believe, and these figures were computed as of 1954, and

(Testimony of Gordon Powers.)

that modification was still in effect at the date of November 4th, 1954.

Q. I wonder if for the record, Mr. Powers, if you [74] would just multiply out and summarize what you have said, that is 98 cow units which are the number in excess of that authorized and permitted, times the one and a half times the rate under the contract? A. Let's see.

Q. This is always an anxious moment to see if it comes out.

A. Well, I have a figure of $2,466.36, is that fairly close?

Q. That is close enough, this says 66c, we will let your—would you read that amount again, please?

A. Two thousand four hundred and sixty-six dollars, thirty-six cents and six mills.

Q. Mr. Powers, was a demand made upon Mr. Fraser for that sum or similar sum?

A. Yes, I believe it was.

Q. Do you have any records of your office that show that?

A. Yes, I think I do, if I can look here a moment. I must be looking in the wrong one, here is a (inaudible)—yes, that it is.

Q. May I, is that, you have now found the document that makes a demand upon Mr. Fraser for that sum? A. Yes, I do have.

Q. May I have it so that it can be marked. I hand you what has been marked Plaintiff's Exhibit No. [75] 10 and ask you if this is part of your

(Testimony of Gordon Powers.)

official files and records kept in the regular course of business of which you are the custodian?

A. Yes, this is a copy of my official files.

Q. Will you state what it is please?

A. It is a carbon copy of a letter sent by registered mail addressed to Mr. R. B. Fraser, in care of R. B. Fraser, Incorporated, 2015 First Avenue North, Billings, Montana, dated November 26th, 1954, for the signature of J. M. Cooper, Area Director.

Q. Now, was that prepared in your office or did you receive this from some place else?

A. I received this as a copy from our Billings Area Office, it was not prepared in my office at Crow Agency.

Q. You mentioned this as having something to do with the cancellation of the permit, is that handled in your office, the cancellation?

A. No, that was not at that time, the approving officer at that time was the Area Director, the officer who approved the grazing permit, and therefore he was the one who cancelled the permit and this was in reference; this document also represents a notice of cancellation of permit.

Q. Prepared by a different office than the one you are in?

A. Prepared in the Area Office. [76]

Q. Who makes the demand, what office makes the demand for this $2466, is that your office or the area office?

(Testimony of Gordon Powers.)

A. Well, in this particular case the area office made the demand.

Mr. Galles: I don't think I will offer this then, your Honor.

Mr. Jones: Could I look at that a minute?

(Whereupon a short recess was here taken; court resumed pursuant to recess, parties present the same as before.)

(Mr. Gordon Powers resumed the witness stand for further direct examination by Mr. Galles, as follows:)

Q. Mr. Powers, the record in this case showed that the complaint was filed on December 24th, 1955, have you had occasion to make any livestock counts since that date involving any of the defendants in this case? A. Yes, I have.

Q. Do you recall them independently or would it be necessary to refer to memorandum you have prepared?

A. I will have to refer to the record, there has been many cases, many dates and I would request permission to.

Q. Did you prepare the memorandum yourself? [77]

A. Yes, these memorandums of record, I did prepare.

Q. Do you have a summary of them that you prepared?

A. Yes, I did prepare a summary of them.

(Testimony of Gordon Powers.)

Q. I have had the summary that you prepared marked Exhibit 11, and I will ask when you prepared that and from what documents or records?

A. Well, I prepared the summary sometime in early June or late May of this year, 1957, I don't recall the exact date.

Q. And from, did you prepare them from other documents?

A. I prepared them from the documents of record, that report, the results of my field investigations.

Q. And the documents from which you made this summary were they prepared by you?

A. Yes, they were prepared by me.

Q. Now referring to that summary, will you state in chronological order, if possible, when you made a livestock count following the filing of the complaint in this action?

A. On March 21st, 1956, I made a field investigation of range unit No. 19 under permit to the Cormier brothers.

Q. What did you find?

A. On that date I counted fifty-nine cattle bearing brands [8] on the left hip, [4] on the left shoulder, VC on the right ribs, and [9] on the left ribs. I found those cattle grazing on two or over two [78] separate allotments under permit to the Cormier brothers, under range unit No. 19, they were allotments No. 1817, and allotment No. 1879.

Q. When was the next livestock count you made?

A. On March 29th, 1956, I made another field

(Testimony of Gordon Powers.)

trip investigation, and I counted at that time, that investigation was of range unit No. 19 under permit to the Cormier brothers, and at that time I counted seventeen head of cattle branded [8] on the left hip, and [4] on the left shoulder, grazing on allotment No. 1879, listed as a part of the grazing permit on unit No. 19.

Q. That is permitted to the Cormier brothers?

A. That is correct.

Q. When was the next livestock count you found?

A. On April 9th, 1956, I made a field investigation of range unit No. 19 under permit to the Cormier brothers, and counted 25 cattle, branded [8] on the left hip, and [9] on the left ribs, grazing on allotments No. 2739, 1803 and 2740, all three allotments being under the grazing permit to the Cormier brothers on unit 19.

Q. When was the next one you found, if any?

A. November 20th, 1956, I made an inspection of range unit 19 under permit to the Cormier brothers, and on that date I counted 33 cattle, with the brand [8] on the left hip, on allotments No. 1817 and [79] 1879, under the permit to the Cormier brothers on unit 19.

Q. Did you find any other livestock on subsequent dates?

A. Again on December 12th, 1956, I made another range inspection of range, let me see, this inspection on December 12th, 1956, was on range units No. 18 under permit to the Reservation

(Testimony of Gordon Powers.)

Ranchers and Farmers Co-operative Association, and unit 19 under permit to the Cormier brothers, and I found a total, counted a total of 21 cattle grazing in range unit No. 18, with [4] on the left shoulder, I have the summary if I may look long enough to find it, it will make this easier to identify, well, these 21 cattle in range unit No. 18 were on various allotments, under the grazing permit of unit 18, permitted to the Reservation Ranchers and Farmers Co-operative Association, and 63 cattle were found on various allotments on range unit No. 19, under permit to the Cormier brothers; these cattle on the two units carried these brands, [8] on the left hip, [4] on the left shoulder, VC on the right ribs, and that is it.

Q. Did you find any other cattle in connection with your duties and this case after that or on the same day?

A. On this same date, December 12th, 1956, I also [80] counted 37 cattle grazing on, over three separate allotments, on allotment No. 2096, under competent lease to the Cormier brothers; No. 2116, under office-approved lease to the Cormier brothers, and No. 2119, under competent lease to the Reservation Ranchers and Farmers Co-operative Association.

Q. Thereafter, did you make any livestock count in connection with this case?

A. On January 17th, 1957, I made another field inspection over range units No. 18, under permit to the Reservation Ranchers and Farmers Co-opera-

(Testimony of Gordon Powers.)

tive Association, and unit No. 22, under permit to the Cormier brothers, and I found on that date 33 cattle bearing—I will look at my—the [4] brand on the left hip and [8] on the left hip—no, that [4] is on the left shoulder, not on the left hip.

Q. That was which, that was the 33 head?

A. That is 33 head, yes.

Q. And you said you found 41 head on range unit 22, permitted to the Cormier brothers?

A. On January 17th, that same date, I found 41 head on range unit No. 22, permitted to the Cormier brothers, on two separate allotments.

Q. Were those cattle identified by brand?

A. Yes.

Q. By you?

A. I identified the [4] left shoulder brand, and the [81] [8] left hip brand.

Q. Did you observe any other cattle on that day or later in connection with this case?

A. Yes, on this date, same date, January 17th, 1957, I further counted on three different allotments 247 cattle, these cattle were distributed over allotment No. 2116, under office-approved lease to the Cormier brothers, allotment 2613, under competent lease to Orie Dosdall, and No. 2003, under competent lease to the Cormier brothers. These cattle bore brands VC right ribs, and [4] left shoulder, let's see, and that is all the brands.

Q. Did you find any cattle that subsequent date?

A. On March 27th, 1957, I observed the movement of a herd of cattle by various cowboys, and I

(Testimony of Gordon Powers.)

counted those cattle through a gate, and my tally came to 358 cattle, bearing the brand VC right ribs, and I observed the movements of this herd of cattle, let me make a correction, my count was 362 head, the 358-head tally was that of another individual, and I observed the movement of these cattle over eight separate individual allotments under various land-use control, allotment No. 3109 is under competent lease to the Cormier brothers, allotment 2004, under competent lease to R. B. Fraser.

Q. That is the same defendant here, he had a right to have his cattle there? [82]

A. That is correct, he had the competent lease on that tract of land.

Q. Very well.

A. Allotment No. 1832, under competent lease to O. W. Crawford; allotment No. 3267, under competent lease to Mrs. E. E. Hanson, and another portion of allotment No. 3267, under competent lease to O. W. Crawford, and allotment No. 2021, under office-approved lease to W. R. Crawford, and allotment No. 2609, under office-approved lease to Orie Dosdall, and allotment No. 2086, under office-approved lease to R. B. Fraser.

Q. Did you make a livestock count on any date subsequent to March 27th, 1957?

A. No, I have not.

Q. Mr. Powers, have you made any kind of demand, request or otherwise to R. B. Fraser, R. B. Fraser or any of the other defendants in this case, to remove their cattle from trespass?

(Testimony of Gordon Powers.)

A. Well, yes I have on these occasions, where we issued, that is my office out of Crow Agency, issued formal notice and demand for penalty and for removal, immediate removal of livestock, and then other occasions, in talking to agents of Mr. Fraser and in talking to Mr. Fraser himself, I have made requests for removal or reduction of livestock in numbers. [83]

Q. Have you been trained in range management and range control, Mr. Powers?

A. Yes, I have.

Q. What is your education on that?

A. I have a bachelor of science degree in forestry with range management major.

Q. And have you been performing that kind of work since your graduation from college?

A. Yes, entirely, with the exception of a little over three years in the air force.

Q. When and where did you graduate in forestry?

A. From the University of Montana at Missoula in 1942.

Q. Will you state under what conditions the grazing of grasses on the Crow Indian reservation damages the land?

A. Well, any time that there are more animal units grazed over a period of time, that is longer than that forage production will support in animal units, there will be damage to the residual forage itself.

(Testimony of Gordon Powers.)

Q. And in the case of an occasional grazing on the land, of course, the livestock eat some of the forage that is there, that is true?

A. That is correct.

Q. Is there an easy way or not to determine just what the amount of grass they have eaten or how much damage they have done to the land?

A. Oh, it is not easy at all. As a matter of fact it is [84] extremely difficult to determine permanent abuse to forage or permanent, by abuse; I mean continued over-grazing, in order to determine that positively it is necessary to conduct research experiments, taking into consideration the annual forage production in connection with the clay and the precipitation, and the trend to change of species of forage, there will be a decrease or increase of certain species, depending upon the trend. If the trend is one of deterioration, there will be a decrease of a desirable species, and an increase of the undesirable species, and an over-all reduction in total, total volume of production, and it is difficult to determine that permanent damage.

Q. In terms of dollars, for example?

A. In terms of dollars it is extremely difficult, because now you are dealing with market value, which is determined by business practices and competition and so forth.

Mr. Galles: You may examine.

(Testimony of Gordon Powers.)

Cross-Examination

By Mr. Jones:

Q. Mr. Powers, is it—I don't know whether you can tell me this or not, but I would like to know is it the Indian department's position that where other peoples' cattle are found on competent leases, that the Indian department has the duty there and [85] feels that they should bring these actions of trespass on competent leases?

Mr. Galles: To which we will object as no proper foundation laid, calling for the conclusion of this witness, and in the absence of that foundation I don't believe he is qualified to answer that question.

The Court: Objection sustained.

Q. Mr. Powers, do you know how long you have been in the forestry, in the forestry department of the Crow Agency itself?

A. I have been working under the superintendent of the Crow Indian Reservation since March 7th, 1947.

Q. And do you receive from time to time, bulletins from the Department of Interior and the Regional Office in reference to policy in your work?

Mr. Galles: Object to that as immaterial and irrelevant, it is a question of what under the law, rather than the policy or bulletins or internal administration, I think it is a question of law as applied to the evidence that is received in this case.

The Court: Objection sustained.

(Testimony of Gordon Powers.)

Q. Well, in reference to these competent leases, they are the Indian, the Indian doesn't have possession [86] of the property, do they?

A. Well, I don't know what you mean by possession; they have title of ownership in trust status, yes.

Q. Well, the Indian allottee, or trust owner, ordinarily when he gives a competent lease, say a competent grazing lease, he doesn't run his cattle on that piece of ground does he?

Mr. Galles: Objected to as calling for a conclusion of the witness and immaterial.

The Court: I will let him answer that; objection overruled.

A. In some cases they do, yes; they will lease their land and they will also stipulate that they reserve the right to graze a certain number, or maybe not a stipulated number, but just their cattle on that land along with the lessee's cattle.

Q. Now, in reference to these office leases of Cormiers, in reference to these trespasses on December 12th, 1956, where it says that an office lease to the Cormier brothers on lot 15, section 6, township 4 south, range 27 east, do you know who has possession of that land?

A. If I understand your question correctly, I will answer that I do not know who has physical possession, if anybody. I know that the land-use is authorized to the Cormier brothers under this [87] identified office-approved lease.

(Testimony of Gordon Powers.)

Q. And does that hold true as to competent leases as to use, is that correct?

A. I don't quite—I don't believe I understand your question.

Q. Well, in other words, you say the office lease is the use of the land under this office lease to the Cormier brothers?

A. That is the authorized use.

Q. Then, is also the authorized use of these competent leases to the Cormier brothers, too, where they have a competent lease?

A. That is correct; that is the legal authorized use.

Q. And is that also true in reference to these permitted units, such as unit 19?

A. Yes; all of the lands, the individual allotments that are listed as part of these grazing permits, carry with it the authorized use of those tracts of land for grazing purposes only, and not to exceed these designated stocking limits.

Q. Then, in other words, insofar as the use of this land goes, between a permit, or either a competent lease or a non-competent lease, will you say that that question of difference is how it will be used, is that right?

A. Well, I will answer you this way and see if this is the answer you would like: I would like to say [88] there is a distinct difference between the privileges authorized under a grazing permit and those authorized under a lease. The grazing permit is a revocable contract, and it is for grazing pur-

(Testimony of Gordon Powers.)

poses only. A lease may be a grazing lease, but it carries with it the residual leasehold rights that are greatly in excess of for grazing use only. They may be; there is a considerable difference in actual possessed use between those two types of contracts.

Q. But it is a possessed use, is that correct?

A. It is an authorized, possessed use in each case; one is quite limited; the other is very broad; that doesn't have those rigid limitations, that is, I am speaking of leases now, it doesn't have these rigid limitations that revocable grazing permit does.

Q. Now, in reference to these, for instance, this trespass cited March 27th, 1957, through these competent leases, what was being done with these cattle at the time, do you know?

A. So far as I could observe and in discussing the movement with the cowboys present, I concluded that they were being moved from one area in which they had been grazed for part or most of the winter to another area that they were to be grazed on from there for an unknown period at the time.

Q. Did you have the conversation with the cowboy in [89] charge of these cattle at the time?

A. Well, I don't know who the cowboy in charge was, but I discussed—I had a discussion with Mr. Park Taylor and Mr. Dan Fraser.

Q. Did you give them permission to go through that gate at the time?

A. I didn't give permission. I was asked if there was any definite place that the cattle should be taken or should not be taken, and my answer to that

(Testimony of Gordon Powers.)

question was that I was not there to indicate anyplace they should or should not go; that I was not there to place a trap in which they might be led whereupon I could make a demand. I advised the two individuals, Mr. Taylor and Mr. Dan Fraser that I was there merely to observe the movements and to record or observe for future recording what occurred.

Q. Now, in reference to these violations, say on March 21st, 1956, did you get a call from the Cormiers in reference to these violations at that time?

A. I think I did, if you will permit me to——

Mr. Galles: I will object to that as being immaterial unless you have some purpose in——

Mr. Jones: Well, your Honor, I don't know how material some of this testimony is going to be, it is preliminary. [90]

The Court: Objection overruled.

A. Yes, as I recall I did get, I don't have it on this record, if I looked in my files long enough I think I would have, would find my memorandum, but as I recall, I did get a telephone call from one of the Cormier brothers inviting my attention to some cattle grazing within this range unit No. 19.

Q. And was that on the 21st day of March, 1956, that call or had you been called earlier?

A. I don't recall whether it was on that day or the day previous, I will look a moment here and see if my memorandum recorded in this reveals any of that, it is possible, I think I will have to look at my diary, if I may, because I don't seem to have any-

(Testimony of Gordon Powers.)

thing right here, I don't know if I am going to find it or not.

The Court: Could you go on, Mr. Jones, and come back to that at the next recess?

Q. All right. I believe you stated, Mr. Power, that on February 12th, 1952, that you received a phone call from Mr. Joe Cormier in reference to some livestock on land in unit 22 at that date?

A. I don't recall whether I made that statement, but I did receive a telephone call or a complaint from Mr. Joe Cormier on the 12th day of February, 1952.

Q. In other words, did you talk to Mr. Cormier yourself [91] in reference to this complaint?

A. Yes, I did.

Q. At the time you observed these cattle in this unit 22 what would you describe where these cattle were, were they bunched up or spread out or how?

A. They were pretty well scattered, as a matter of fact, I would judge they were probably, oh, several hundred head of cattle in this area, and they were in, they were fairly well scattered, and the ones that I have already described on this date, as having been located there, and they were in groups of a few head to several head, and over all the whole area, not just limited to this described land, there were, I would judge, to be between 100 and possibly 300 head of cattle, it is, I made no attempt to actually determine total numbers of cattle.

Q. Were some of these cattle in this overall area Mr. Cormier, the Cormier brothers cattle?

(Testimony of Gordon Powers.)

A. On this date, no. I found no other cattle, other than those with the VC and the [2] brands, in this whole general area, that was on the date of your referring, counsel, you are referring to this date of February 13th?

Q. Yes.

A. Yes, that is the date my answer goes to.

Q. Well, in this area, you speak of this, the exterior [92] boundaries of unit No. 22, is that unit fenced, the interior boundaries, is there a fence on that?

A. There are fences over most of the boundary, but not all of them are on line and there are numerous interior fences as well.

Q. Well, is there, so the Court will know, do other people have lands within the exterior boundaries of these designated units, other than the permittee?

A. You mean land-use or land ownership?

Q. Well, either land-use or land ownership?

A. Oh, yes, yes there are of course a great many individual tracts of individually-owned land in this boundary, and some of those tracts are now in fee patent status, the Indian ownership has been extinguished, and there are competent leases held by others than the permittee, does that answer your question?

Q. Yes, and are these lands within this unit—I take it that you are familiar with this whole area, you have been over it many times, is that correct?

A. Well, I wouldn't say the whole area, no, but the area in which I have had occasion to specifically

(Testimony of Gordon Powers.)

direct my attention, for some reason such as this, as such as has been revealed in the records here, I am quite familiar with those portions of the area.

Q. Well, now, there is nothing, there is no fences [93] in most instances upon this area, is there, to prevent a cow from wandering from a part of unit 22, say, to off on to a piece of ground that is leased to somebody other than the permittee under that unit, is there?

A. No, there are no fences, there are not fences in all cases that would totally prevent movement of livestock from one tract of land to another tract of land, within the exterior boundaries of range unit 22; however, in some cases there are, you see it is necessary to understand that the original range unit as fenced and as bounded by the exhibit, I don't recall the number, that—Exhibit No. 2, has changed considerably since over the years those are actually into the third contract period now, since this exhibit shows the boundary that that exhibit shows, and of course, the fences have not all been moved as the ownership or use control changed during those two and a third contract periods.

Q. Now, in reference to this unit No. 19, upon the termination of Mr. Fraser's permit, who became the permittee for grazing purposes?

A. The contract was awarded to the Cormier brothers, after the cancellation of the permit held by Mr. Fraser.

Q. And was that permit bid?

A. It was first, if you would like me to trace the

(Testimony of Gordon Powers.)

manner [94] in which the Cormiers acquired this permet, is that what you want?

Q. Yes, I would like to know.

Mr. Galles: I will object as being incompetent.

The Court: Overruled.

A. The land within the range unit 19 was advertised for bid, and as I recall, one bidder, I believe, was all there was, the contract was offered to this bidder, but he did not complete his contract under our advertisement requirements, and then the contract was negotiated according to regulation, prior to the twelve months after the advertisement was issued, to the Cormier brothers, at the same rate that it was advertised at.

Q. You mean that is per head unit?

A. Yes.

Q. Do you know what their rate was?

A. Yes, I can find out immediately, at $10.05 per head, that is $10.05 per head per season, and of course it is important to know that this season in this case was a six months season, yes, from June 1st to November 30th, rather than year-long, that had been the previous season.

Q. Now, in reference to these seventeen head of horses that you referred to, I believe you stated you were unable to identify these horses, is that [95] right? A. On what date?

Q. Well, these seventeen head of horses that you refer to on page 4, on November 4th, 1954?

(Testimony of Gordon Powers.)

A. Yes, that is correct, I was not able to identify brands.

Q. And these horses, but you still charged Mr. Fraser with the penalty for these horses being in there, although you don't know, couldn't identify the horses, is that correct?

A. Yes, that is correct, and the reason being that the permittee is responsible for not exceeding, not allowing the animal units to exceed the number that he is authorized to have within the confines of his grazing permit, at the stipulated or during the stipulated season, he is responsible for the numbers of livestock no matter who they may be owned by or where they come from, he is liable to maintain stocking, no greater than the maximum number authorized.

Q. In other words, the Government, or the Bureau, on behalf of the Indian, looks to the permittee, is that correct, on these things?

A. No, that is not correct, I didn't say that.

Q. Well, I can't quite get this, Mr. Powers, is this, what I am getting at, is that Mr. Fraser is charged with this overstocking of seventeen head, which you have admitted here that you don't understand, you don't know, or unable to identify them, you don't know [96] whose horses they were in other words, whether they were his or somebody else's, or for that matter the Cormiers?

A. Well, no, I had good reason to presume that they were Mr. Fraser's horses, because in my conversations with Mr. Fraser and with his agents, in

(Testimony of Gordon Powers.)

times past, they had mentioned to me that they used that range for grazing of horses on occasions, as a matter of fact that Mr. Fraser bought and sold horses, and held them in this range unit, and that he dealt in horses and grazed horses in this range unit area, and further at one time I offered or proposed to Mr. Fraser that he modify his grazing permit to include horses as a class of livestock, as well as cattle, as a class of livestock, under his permit so that he would then in no way be violating his permit, which actually was limited to cattle as a class of livestock, so it was not uncommon for me to observe horses grazing in range unit 19, and it was definitely understood between Mr. Fraser and myself that there were horses of his grazing in there from time to time, and that there was nothing in particular wrong with it except as I had called to his attention, I would much prefer if he would actually get his contract to list those horses as a class of livestock so that there would be no actual violation of his grazing permit in his grazing of horses in that unit. [97]

Q. But I believe you stated that it was the permittee who is responsible for any livestock within the unit, is that correct?

A. No, I didn't state that, what I stated was——

Q. Let's just check the record please, will you go back?

(Whereupon, a short recess was here taken; court resumed pursuant to recess, parties present the same as before.)

(Testimony of Gordon Powers.)

(Mr. Gordon Powers resumed the witness stand for further cross-examination by Mr. Jones, as follows:)

Q. Mr. Powers, who gives notice to these, to the lessees on the reservation, do you know who gives notice to the lessees on the reservation in reference to the regulations, the Indian regulations, in reference to leasing and using of these units; does that notice go out through your office or through you, is it given there, the records that are under your care?

A. No, I don't, I don't have any administrative responsibility for the leasing policy or regulations.

Q. Isn't it true, Mr. Powers, that pretty near all of these charges of trespass by Mr. Fraser have been brought by notification to you of such trespasses by the Cormier brothers?

A. No, some of them have, but not pretty near all of them.

Q. How have they notified you, is it always by telephone, [98] by letter or otherwise?

A. Oh, it is by telephone and by personal visit to the office, both, on those occasions when they did notify me.

Q. They haven't communicated with you by other means have they, for instance by radio?

A. No, no, I don't recall by radio, of course we don't have, we don't maintain any radio communications with that end of the reservation, just within our Government communication system entirely.

Q. I believe you stated that originally, under

(Testimony of Gordon Powers.)

these grazing units, that the Government, that these units were fenced like unit 22, originally was fenced, and then it belonged to one party?

A. The units were not all fenced entirely, and they were not all fenced right on the line, there are many fences between adjacent units, that do not follow the identified grazing permit land control, because of the terrain and irregular lines, there will be a straight fence cutting across an irregular line and gives and take on both sides of trade of land, so it is more convenient to keep up the fence than maintain a straight fence.

Q. When you say this, this has kind of been down through the history of a give and take proposition is that right?

A. No, I said that some of these unit [99] boundaries, boundaries between adjacent units, have a straight fence, passing through an irregular boundary line, that will result in that case, a give and take proposition to promote easier fence maintenance, and more logical fence location.

Q. Well, did you have any conversation, or did you at one time attempt to get the Cormiers and Frasers to straighten out their units, back in about 1950 or 1952?

A. Yes, I devoted considerable time to that.

Q. What was the outcome on that?

Mr. Galles: I will object to that as immaterial, incompetent, it seems we are getting outside the issues of this case, your Honor.

(Testimony of Gordon Powers.)

(Argument to court by counsel.)

The Court: Well, I will let him answer this question, I don't think we should go into this any great length.

Mr. Jones: I don't intend to, your Honor.

The Court: Very well, objection overruled.

A. Could I hear that question again?

Mr. Jones: Would you repeat the question?

(Whereupon, the last question asked [100] was repeated by the court reporter, which question is in words and figures as follows: "Q. What was the outcome on that?")

A. No success.

Q. Was Mr. Fraser agreeable to fence his share of the land off, and block it off?

A. I don't know because I couldn't get a common meeting where Mr. Fraser could make such proposal to the Cormiers.

Q. Well, didn't the Cormiers absolutely refuse to it?

A. No, not that I know of, I would have to answer negatively to that question.

Q. Now, in reference to your testimony pertaining to trespass on unit 22, January 31st, 1952, I believe you identified these units as the southwest, and allotment 2505, Lion That Walks, southwest quarter of section 33, township 3 south of range 26 east, and that you found 27 head of cattle in there at the time,

(Testimony of Gordon Powers.)

were these cattle scattered out or where, just where were they located?

A. That was on January 31st?

Q. Yes, that is on page 1.

A. I want to be certain of that date, because it is 28 cattle that I counted.

Q. Well now——

A. That day on that tract of land.

Q. Well, there is 27 cattle on the one? [101]

A. Oh, excuse me.

Q. And 28 on the other, but I am referring to the first one?

A. Yes, 27, they were dispersed as cattle normally grazing would be, they were all on one acre area of that 160 acre tract, no.

Q. Could you tell whether they had been grazing there quite awhile or what?

A. No, it wouldn't be possible, that was in the winter time, and as a matter of fact there was lots of scattered snow cover, and the range of course had the appearance of old, dry, winter range and it was frozen, the ground was frozen and I don't know how long they had been there.

Q. I hand you Plaintiff's Exhibit No. 2 here, and for your reference now, isn't it true that Mr. Fraser had either owned or leased land in a close proximity of where his cattle were found and trespassed?

A. Yes.

Q. And that there is no fence between where these cattle were found on Mr. Fraser's land, is that correct? A. That is correct.

(Testimony of Gordon Powers.)

Q. And these cattle could pass back and forth on either, on any of this ground, isn't that true?

A. Will you state that again?

Q. These cattle could pass back and forth on any of this ground? [102]

A. Yes, there was no fence control to prevent them.

Q. While you have been forester at Crow Agency, Mr. Powers, have you ever notified Mr. Fraser that he had to fence his cattle off these units 19 and 22? A. I don't believe I have.

Q. Is there anything in your records that, or the records if you know, or the records at Crow Indian Agency, that Fraser has been so notified to fence?

A. Yes, there is one document that I remember, I recall seeing today I think, I saw it again here today, in this file, yes, there is here a letter dated January 20th, 1954, to Mr. R. B. Fraser, Billings Hudson Company, Billings, Montana, signed, typed for the signature of Robert Yellowtail, that states in the penalty matter paragraph, "We must insist, however, that all further use of these competent lands in range units be controlled by fencing these areas and the livestock confined within these fences."

Q. That is the only notice that you know has ever been given to him, is that correct?

A. I believe that is the only one I have seen.

Q. Do you know whether this notice has been given to all other lessees and permittees on the reservation? A. I have no knowledge of that.

Q. I hand you Plaintiff's Exhibit 9 and refer to

(Testimony of Gordon Powers.)

paragraph 3 of the range control stipulations, and ask you if you know how long that stipulation has been [103] in effect on these permits since, on these contracts?

A. It has been in effect all of the time that I have worked for the Indian Service, since March of 1947.

Q. Do you know whether or not these, I will ask you if from reading that instrument if you can determine what date these stipulations went into effect?

A. It was these range control stipulations on this printed form were approved May 29th, 1931, by C. J. Rhoads, Commissioner of Indian Affairs.

Q. Mr. Powers, in reference to overgrazing, will you state that the, if the damage to the owner were where land is overgrazed, that that damage, the amount of that damage would have a direct bearing as to the amount of revenue he could make, get in the future from leasing that grass or using that grass himself, is that about how you would put it?

A. Yes it does, if it continues.

Q. In other words, the damage is his loss of revenue, either by being able to use the piece of ground himself or by leasing it, isn't that correct?

A. Yes, that is correct, the damage is accumulative, it doesn't occur overnight as a rule.

Q. Well, do you know whether or not, Mr. Powers, that the value of grass on the reservation has increased or declined in the past few years?

A. Well, the average on the reservation has in-

(Testimony of Gordon Powers.)

creased slightly during the time I have been, about ten years [104] a little over ten years that I have been here.

Q. Going to your testimony in reference to the overstocking of unit 19 in November, do you recall were these cattle spread all over that unit or whereabouts on the unit were they, do you know?

A. Oh, they were congregated mostly on the south end of the range unit No. 19, that was the area supporting most of the water.

Q. Was there anybody there besides yourself and Mr. Pilgeram at the time you made this count?

A. No, there were only Mr. Pilgeram and myself.

Q. And were these cattle located on deeded land of Mr. Fraser's at the time, or in the unit?

A. There could easily have been some of these numbers on Mr. Fraser's deeded land, he had deeded land listed with his on and off, which allowed the certain authorized carrying capacity or stocking rate.

Q. Do you know whether these cattle had been on there prior to November 4th, 1954, in excess number?

A. Yes, there had been varying degrees of excess cattle over a period of several months.

Q. Have you observed them there?

A. One individual on my range staff made such an inspection and report, which resulted in a notice to Mr. Fraser.

Q. Was that, that was in May of 1954, isn't that correct, May 25th? [105]

(Testimony of Gordon Powers.)

A. I believe, I believe it was.

Q. That was the only other time, is that right?

A. Well, back in 1949 I believe, I had to make a demand on Mr. Fraser to reduce his excess numbers in this same range unit.

Q. But that was the only other time in 1954, is that correct?

A. I am not sure, I believe that is—I believe that is correct, but I am not certain; in August 27th, 1951, Mr. Pilgeram wrote a memorandum to me reporting that he had counted a total of 353 animal units, grazing under this grazing 19 permit, which authorized only 124 head, and a letter was written to Mr. Fraser dated August 31st, 1951, pointing that out to him, requesting that he reduce his numbers and advising him that if he did not reduce his numbers, he would be subject to this one and one-half times the regular rate per head as a penalty, and there were also horses in the unit at that time, 113 as a matter of fact, and at that time I advised Mr. Fraser that if he desired to graze horses in lieu of cattle, in part or in whole, why it would be necessary to modify his contract to provide for that, and please advise this office without delay the plan of operation you intend to follow, and on November 13th of 1952, I had a memorandum from Mr. Stanton, range conservationist, to me, reporting that he and Mr. Pilgeram [106] had counted a total of 180 cow units, when the permit called for 123 cow units, and at that time there were again 23 horses counted, when the permit authorized no horses.

(Testimony of Gordon Powers.)

Q. What date was that?

A. That was November 13th, 1952, and on November 18th, 1952, a letter was sent to Mr. Fraser advising him of this overstocking, and again warning him that if it continued there would be, it would be necessary to invoke this one and one-half times the regular rate per head penalty; and on May, yes on May 24th again, that date that you mentioned of 1954, Mr. Stanton's memorandum reports an overstocking, a total of 230 cow units, when the permit authorized 123 cow units, and does that bring us up to the date you were after or shall I continue?

Q. Then, between May, 1954 and November, 1954, you did not make any further count, is that correct?

A. On July 26th, 1954, Mr. Pilgeram, in a memorandum to me, reported a count on range unit 19 in which he counted 183 head of cattle, and three horses, when the permit authorized only 123 cattle, and on July 28th, 1954, a letter was written to Mr. Fraser advising him of that, and just a day or so before this, I had talked to an agent of Mr. Fraser's advising him of this situation, and his agent, Mr. Fraser's agent, assured me they had planned to remove some [107] of those cattle, and that they hadn't any knowledge of any excess stocking, so in this letter of July 28th, 1954, it was mentioned to Mr. Fraser that Mr. Lippert, Superintendent, signed this letter, and it was written that Mr. Powers suggested the possibility that some cattle might have been moved into unit 19 from north of the Highway

(Testimony of Gordon Powers.)

87, without Mr. Fraser's knowledge and it was requested that Mr. Fraser have a count made in an attempt to determine where the excess cattle did come from, and then on November 3rd, 1954, Mr. Pilgeram again in a memorandum written to me, reporting a count made by him on November 2nd, 1954, the count of 172 cattle and 17 horses, when the —that amounts to a total of 197 cow units, when the permit authorized 123 cow units.

Mr. Galles: What was the date of that, Mr. Powers?

A. The inspection was made on November 2nd, the memorandum reporting it was written November 3rd of 1954.

Q. Well, is this the same inspection you are referring to at page 4 that you have heretofore testified to? A. What is the date on that other one?

Q. November 4th, 1954?

A. No, this is not the same, Mr. Pilgeram made this November 2nd inspection independently, or I should say alone, not in my presence.

Q. And in other words, these were probably the same [108] cattle that you saw on November 4th, is that right? A. Very likely.

Q. Could be that these were the same cattle that you saw that were seen on May 24th of 1954, too?

A. Could be, I wouldn't know.

Q. Now, in reference to this unit 19, to go back, it is true isn't it, Mr. Powers, that included in this unit is competent leases and deeded land on and off —on an on and off basis, is that correct?

(Testimony of Gordon Powers.)

A. On range unit 19?

Q. Yes.

A. Yes, there are those lands located within that unit boundary.

Q. And that is true of this unit 19 when Mr. Fraser had it, isn't that correct?

A. That was true when Mr. Fraser had the permit.

Q. And on this unit 19, do you know where the water holes are, or whether that was on deeded or leased land or just permittee land in 1954?

A. In 1954?

Q. Yes.

A. May I consult that map of Exhibit No. 2, I believe it is, I think——

Mr. Galles: That is No. 22?

A. Yes, this is the one, the one large source of water comprised of a stock water reservoir in 1954, on December; any particular date in 1954 you [109] are interested in—anyway, in 1954, it was located on permitted land that Mr. Fraser had under his permit, until December 1st of 1954, at which time a competent lease was negotiated by Mr. Fraser on that tract of land, that became effective December 1st of 1954, and then Mr. Fraser held that water, controlled that water through his competent lease, and since that time, it has been that same tract that on which this reservoir is located, has been bought by Mr. Fraser and he was issued a patent in fee on that tract. Another tract on which a well is located, is now and has been for—I wonder if I can tell just

(Testimony of Gordon Powers.)

how long—at least it is now located and was in 1954, on land owned by Mr. Fraser by fee patent and a small reservoir located in 1954, or during the time Mr. Fraser had the permit, it was located on permitted land and at the present time and during the period since, Mr. Fraser has not held the permit and the Cormier brothers have held it. It has continued to be—it has continued in that noncompetent, permitted status, and those are the three major sources of water.

Q. Would you tell me what the description of that, where that last is?

A. It is on, excuse me, I will look at the plat book, it is located in the northeast of the northeast quarter of section 22, township 1 south, range [110] 27 east, on allotment No. 2739, owned by Pearl Elizabeth Costa.

Q. You say, do you know whether that reservoir is ordinarily, carries much water, how big a reservoir is it?

A. Well relatively, it is quite small and it does not hold water during the real dry periods.

Q. And other than that, this range unit 19 has no water on it, is that correct?

A. No permanent water, no flowing water.

Q. Do you recall what the condition of the permitted allotments, and by permitted I mean to differentiate between competent and incompetent or deeded land, permitted allotments on unit 19, at the end of 1954?

A. Yes, the south end of the range unit where

(Testimony of Gordon Powers.)

this large reservoir was located, or is located, and at that time, it being permitted land, was quite severely used naturally due to the congregation of cattle around the water, and there was quite a large area surrounding that water that had taken quite a lot of abuse.

Q. How many cattle, how many cattle does unit 19, that is in reference to permitted, not in reference to on and off, but in reference to the permitted units, how many cattle are allowed, and were allowed on unit 19 subsequent to 1954, or do you know?

A. Yes, the contract that Mr. Fraser held, stipulated [111] 82 head.

Q. No, I am talking to subsequent, when Mr. Fraser's——

A. Oh, after he lost, I see, after he lost the permit, I will have to look at the contract—83 head, the same as it was previously when Mr. Fraser held the permit, for a six months season, which is half as long as it was when Mr. Fraser held it.

Q. In other words, in reference to these permits, that is based on the condition of the range, is that correct, and amount of land involved in that unit?

A. Yes, when these permits are advertised and then contracted as a result of the bids, the stocking limits are based on the best estimate that we can make on the anticipated forage, average forage production over this whole five-year period, that will insure against overstocking or overgrazing in the event of unusually dry or unproductive years.

(Testimony of Gordon Powers.)

Mr. Jones: That is all.

Redirect Examination

By Mr. Galles:

Q. Mr. Powers, I believe you stated in your testimony under cross-examination, that it was the responsibility of the permittee for the excess stock, no matter whose they were, or words to that effect, is that about what you said?

A. I think that is about what I said, yes.

Q. What is the requirements of your office in the event there is an overstocking by livestock [112] that does not belong to the permittee, what happens?

A. Well, it is the responsibility of the office, my office, to investigate and determine ownership or control responsibility for control of the numbers in excess where they are not accepted as being the responsibility of the permittee.

Q. How do you get that information?

A. Well, normally we do it in several ways. We may either make a range count independently in our normal range use, check and discover excess stock, and then we will attempt to determine what the control is, and naturally we will first go to the permittee to determine whether he has, whether he accepts responsibility for this excess livestock, or whether he can indicate to us to whom they might belong; another way, we will have it reported to us by the permittee, when there are cattle that he does not assume responsibility for, grazing in his area, in excess, which brings the total stock in excess of his

(Testimony of Gordon Powers.)

authorized stocking, and he will then, he will notify us and ask us to take trespass action against the individual who does, who is responsible for them.

Q. In that type of case, where the Cormiers were reporting to you of certain excess stock on their permitted lands?

A. That is correct, and if the permittee does not [113] indicate to us that he assumes no responsibility, if he does not indicate to us that he does not assume responsibility for those excess numbers, then we go to him, as the permittee, as the assumed responsible controller of those livestock; in other words, if they are not his, he normally lets us know right quick they are not his, and he wants us to do something about it and——

Q. With reference to these letters that were written to Mr. Fraser, advising him of overstocking, do you recall or have any record of any response that was made by Mr. Fraser, calling at your office or letter, or other communication?

A. I don't believe I ever received any letters, I did receive a response from Mr. Fraser's agent to the effect that they would reduce their number of stock and ask for an extension of time.

Q. Who was that?

A. Mr. Clark McGarry, and he asked for an extension of time due to circumstances beyond their control, in which to reduce them, and it was given to them.

Q. Was that the only time you received any re-

(Testimony of Gordon Powers.)

sponse from all these letters or were there other times?

A. There were other times when Mr. Fraser responded by actually reducing those numbers, too, in 1949 and '51, I recall, when we made demands on reduction, for a reduction on Mr. Fraser, the next time we [114] went out to make a count, they had been reduced.

Q. Had the overstocking been reduced during the year 1954 as a result of any of your letters?

A. Not to our knowledge, because every time we made a count, we still found greatly in excess of stocking, and we received no response from Mr. Fraser to those demands for reduction.

Mr. Galles: I believe that is all.

Recross-Examination

By Mr. Jones:

Q. I would like to ask, I believe you stated, Mr. Powers, that you investigated the permittee reported these trespasses, and then you investigated to see who was responsible for these cattle, and then took action, is that right?

A. Yes, that is when it is overstocking or grazing of cattle, that are identified either by us or others, that are not properly authorized livestock to graze on that land, we must notify, take whatever action we can take under the regulations to secure removal or reduction, whatever the case may be.

Q. And is this true of any, any land within the

(Testimony of Gordon Powers.)

confines of the boundaries of the unit, whether it be deeded or competent or noncompetent lease?

A. Yes, that is true, in the case where the competent leased and deeded land is listed as a part of the grazing permit, for on and off stocking; where it is not part of the on and off stocking, then it has [115] nothing to do with the permit or the range unit boundary, and I mean by that, that in the case of range unit 19 for instance, the range unit boundary, originally was much larger than it is now, and at the time Mr. Fraser held the range unit 19 its boundary at that time enclosed the land that Mr. Fraser had under competent lease, and owned through fee patent, as well as the permitted land. When he lost the permit, naturally that range unit no longer, or the grazing permit could not longer include those lands Mr. Fraser controlled through competent lease and deeded ownership, the permit could not include those lands in favor of some new permittee because the new permittee did not control them and could not claim them for on and off use, and that naturally strung the unit boundary to only those lands that could be permitted to a permittee other than Mr. Fraser.

Q. But you think my question was that if some of this deeded land and competent lease land was within the unit, say unit 19, then that land, the agency, if there was somebody else's cattle other than the permittees on that land, then the agency would deem that as trespass and enforce and go

(Testimony of Gordon Powers.)

through this procedure and charge these people one dollar a head, is that correct, under the trespass?

A. If those, I don't know, I am not sure I got the [116] question, if you can read that to me.

Q. Well, let me put it this way, in other words, say for instance within this unit 19 as it now sits, there is a piece of say either deeded or competent leased land, within that unit, and it is on and off, and if say Mr. Fraser's cattle in this instance were on that piece of ground as is stated, he was on some of this just straight permit land, then the Department would treat that as trespass also, or is just limited to the permitted land?

A. Our trespass counts have been made only on the permitted land and not on on-and-off land.

Q. And not on competent leased land?

A. No, if it is on-and-off, no, and if it isn't on-and-off, if it is competent leased land, we haven't counted, and counted cattle on those lands for the purpose of trespassing or assessing trespass penalties; we have counted only on the permitted land for trespass purposes.

Q. Then the Government is not involved in these trespass violations set forth in reference to these competent leases, the Government has no interest in a trespass on a competent lease, is that correct?

A. No, I can't answer that, I wouldn't make such a statement one way or the other.

Mr. Galles: That is all. [117]

(There being no further questions, the witness was excused.)

(Whereupon, court recessed at 5:10 o'clock p.m. until the following morning at 9:30 o'clock a.m.) [118]

July 3rd, 1957—9:30 A.M.

(Court resumed pursuant to recess, parties present the same as before.)

MR. CLEM CORMIER

called as a witness on behalf of the plaintiff, having been first duly sworn, testified on direct examination by Mr. Galles, as follows:

Direct Examination

By Mr. Galles:

Q. Would you state your name?

A. Clem Cormier.

Q. Where do you live?

A. Well, I live in town, but I have a ranch south of Billings.

Q. You live in Billings? A. I do.

Q. And what kind of a ranch do you have?

A. Well, raise stock and grain.

Q. Where is that located?

A. It is on the Crow Reservation and adjacent to the Crow Reservation, it is in the Pryor area.

Q. In the western part of the reservation generally, where there are colored spots on Exhibit 1?

A. Right in that area.

Q. Mr. Cormier, were you in court when Mr. Powers testified yesterday? A. I was.

Q. Now, with reference to the, to his testimony

(Testimony of Clem Cormier.)

in connection with a count of 18 horses and 3 mules, were you present on that occasion when he made the count [119] that he testified to yesterday?

A. I was.

Q. Will you state what you did with reference to that count?

A. Well, that morning, that Mr. Powers counted them horses, we come in on the unit on horseback and, oh, there at that point probably a half a mile around, half mile southeast of the corner, that they were in when Mr. Powers counted them, and we checked the brands, that is right along the reservation fence, and it is adjacent to, I think it joins his land, but the reason we brought them into this corner was so we could hold them, someplace to check the brands.

Q. And when you first saw the horses, were they being driven by anybody? A. No.

Q. How were they located?

A. They was just grazing, just grazing in this area.

Q. And how far from that corner and what direction did you say it was?

A. I would say about a half a mile south and east approximately.

Q. And what land was it, whose land?

A. Well——

Q. That you found the horses?

A. It is a unit held by Cormier brothers. [120]

Q. Is that under a permit?

A. Under permit.

(Testimony of Clem Cormier.)

Q. What unit is it?

A. I believe it is referred to as 19 now.

Q. 19?

A. Yes, it is practically every three years that unit numbers do change, and I don't have very much to do with leasing, that is taken care of by my partner, and I would have to refer to be exact, I would have to refer to the map.

Q. Who is your partner? A. Joe Cormier.

Q. Is he your brother?

A. He is my brother.

Q. Mr. Cormier, I will show you what appears to be your affidavit, attached to the motion for preliminary injunction, and ask you if that is your signature, and you made that affidavit?

A. That is my signature.

Q. Would you look the affidavit over, please?

A. (Witness complying.)

Q. Do you recall that day in June of 1945, Mr. Cormier, that is referred to in the affidavit you have just read? A. I do.

Q. Will you state what you did on that day and what you observed? [121]

A. Well, I observed these sheep, I went up early in the morning and I observed these sheep grazing on our leases, and I think I went back to my ranch house on Blue Creek and I contacted the Indian Service and notified them of the trespass.

Q. How many sheep were there?

A. There was about 800 sheep, it says 821 here.

Q. How were they marked or branded?

(Testimony of Clem Cormier.)

A. They had a [10] on, I think, the left side.

Q. What day was that when you observed them?

A. Well, it says approximately here, approximately June 12th.

Q. And you recall that was when it was, or when you made the affidavit, do you know that that was when it was?

A. Well, I think there is certain references that were available at that time, that we are sure the figures are correct, there are other incidents that led up to that, too.

Q. Where did you find this band of about 800 sheep?

A. Well, they were on the south, on the south portion of the unit held by Cormier brothers at that time, I don't even recall what the designation of the unit was at that time.

Q. Will you refer to the affidavit and give the legal description?

A. Section 12 and Section 13, Township 4 South, Range [122] 25 East.

Q. And you say that was under permit to you and your brother at the time?

A. That is right.

Mr. Galles: You may examine.

(Testimony of Clem Cormier.)

Cross-Examination

By Mr. Jones:

Q. Mr. Cormier, are you the same Clem Cormier that testified in the case of Robert, R. B. Fraser, versus Robert Roods?

A. I testified in that.

Q. You testified on behalf of Robert Roods, is that correct? A. Sir?

Q. You testified on behalf of Robert Roods as his witness?

A. Well, I suppose I would be his witness.

Q. And you also testified in behalf of Orie Dosdall in the legal action in District Court in behalf of Mr. Dosdall against Mr. Fraser, is that right?

A. What?

Q. That is in reference to these Hansen lease?

A. Yes, I did.

Q. And you have been involved as an either plaintiff or defendant in numerous lawsuits against Mr. Fraser, is that right? A. I have. [123]

Q. Mr. Cormier, do you know who the lessor was, the Indian lessor of this land in Sections 12 and 13, of Township 4 South, Range 25?

A. You mean the Indian owner?

Q. Yes.

A. I wouldn't know without going——

Q. But you had a lease on it?

A. I know we had a lease on that area, that is right, it wasn't a lease, I think it was a permit.

Q. Have you discussed this permit question with

(Testimony of Clem Cormier.)

your attorney, with United States Attorney—Mr. Galles? A. No, I haven't.

Q. When you testified in this affidavit in 1956, when you made this affidavit, had you discussed whether this land was under permit or under lease to you and your brother?

A. Did I discuss it with who?

Q. With Mr. Galles?

A. Well, I will tell you there has been so many of these actions that for me to pick out any specific one without some reference, it is rather confusing.

Q. In other words, you don't know, you didn't know at that time and you don't know right now whether that land is under, whether it is under permit, a competent lease or office lease, do you?

A. I know that we definitely held a permit in that area, and within the permit, the boundaries of the [124] permit, that we have and we do now, hold certain pieces of competent land or competent leases, wherein we enter into an on-and-off agreement with the Superintendent, but it is all operated as a unit.

Q. You say these sheep were spread out in Sections 12 and 13, were they all over the Section?

A. Oh, they probably were scattered over probably a quarter of a mile square area, they could have been a half a mile square area, sheep generally, when they graze, they are scattered, they are moving all of the time.

Q. You don't know whereabouts in Section 12 and 13 these were located?

A. I couldn't pinpoint it, because actually the

(Testimony of Clem Cormier.)

sheep weren't standing still, when sheep graze they keep moving, they don't stand in any one particular spot, and we weren't molesting the sheep, we were just observing them.

Q. Well, do you know whether they were in Section 12 or Section 13?

A. Well, the affidavit says 12 and 13.

Q. But do you know whether they were at the time you made up the affidavit?

A. At the time the sheep were there, I was pretty sure where they had been, where the cornerstones are, we know there are certain landmarks that are related to the areas out there, that you can come pretty close to describing the area. [125]

Q. Did you locate these landmarks at the time?

A. I would say we did, yes.

Q. Who do you mean by "we"?

A. Well, there is a Mr. Erb Landon there, and I think there was two other men from the Indian Service, actually they are the ones that checked the landmarks, I was there and seen them locate them.

Q. In other words, you were with Mr. Landon and who else?

A. I don't recall the other man's name, but I do recall Mr. Landon.

Q. You weren't with your brother at the time?

A. As I recall, no, I don't think I was.

Q. I notice you state in your permit that you hadn't given anybody consent to run these sheep on this land, is that correct? A. That is correct.

Q. Have you at times allowed people, consented

(Testimony of Clem Cormier.)

to people to run their livestock on some of this permitted land? A. You mean gratis?

Q. Well no, with charge?

A. I have run cattle, my partner and I have pastured cattle.

Q. Other people's cattle? A. That is right.

Q. And permitted them on this permitted land that you [126] have under permit?

A. Yes, that is after, after listing the brand down at Crow Agency, which is the procedure.

Q. Didn't Mr. Jack Crawford have a lease on this Section 14, Township 4 of Range 25 East at that time, didn't he have a lease in there, too?

A. Mr. Crawford—I couldn't describe the various areas that Crawford has leases in over there, he has got some adjoining and at that time, one time Crawford was using some land, it is further, it is further east of there that an Indian made a lease to anyone on, the Indian had, he had, oh, I guess retained it possibly for his own use, but O. W. Crawford claimed some land in that area, but it is further east of there, I think, I am not a lease man, my brother takes care of all the leases and he could give you very accurate information on it.

Q. In other words, you didn't have a lease on all the lands in Section 13, is that right, 4 South of Range 25 East, you didn't have a lease on all of 13, did you?

A. I would have to, I would have to resort to my leases to know, because I have already stated that I am not the lease man for the outfit.

(Testimony of Clem Cormier.)

Q. Well, you stated in this affidavit that you had a lease, and you and your brother had a valid lease to this land under a valid lease to you and your brother? [127]

A. Well, I am pretty sure that at the time we made up the affidavit, that we probably had a map or plat there, we possibly had our leases there, and it was made with reference to facts.

Q. That is when you made this affidavit, is that right? A. Yes, I think so.

Q. And that affidavit, you don't remember now, in other words you are going by the affidavit now, you don't remember actually what happened in 1945 do you, except from that affidavit, is that right?

A. Oh, no, I definitely remember the sheep being there, I remember the sheep being there, I remember the sheep being there for a period of possibly a month, not just for a day or two, over a long period of time, this is just an incident where we counted the sheep, there is also——

Q. But in reference to this lease business, you don't recall whether you had a lease or not, is that right?

A. Oh, I know we had the leases, there is no question in my mind but what we had the lease.

Q. That is the lease on Section——

A. I would say we had a permit in the area.

Q. And, in other words, I think you stated here, that you yourself were not the lease man and you didn't know just what kind of a lease you had on there, is that right?

(Testimony of Clem Cormier.)

A. No, I know that we held a unit there, and I say that [128] within the unit we could have had some competent leases, but they were included in the operational use of the unit through an on-and-off agreement with the Indian Service, but that is definitely a unit area.

Q. What unit was that, do you know?

A. I don't know what the name of the unit was at that time, it seems to me it might have been 28, they have changed them unit numbers every, most of them are changed every five years.

Q. Well, was it a unit or was it a valid lease that you and your brother had, that is what I am trying to get at, whether it was a lease or whether it was a unit, you have stated it was a lease in your affidavit, that is what I am trying to find out?

A. Well, just like I said before, I am not a lease expert.

Q. Well, you were there when this affidavit was made out, and evidently from your testimony that you went over these maps and determined whether you had a valid lease on there, is that right?

A. That is right, I testified that we resorted to our maps or to actual leases in making up the affidavit, but for me to go back in my memory and tell you every competent lease we hold or every office lease we hold would be entirely possible.

Q. I realize that, was this affidavit made up from [129] looking at one of these plat books, is that how you made it up, or do you recall?

A. Well, we have little maps like this, we have

(Testimony of Clem Cormier.)

some of the older unit maps with the boundaries of the units clearly defined on them, and they are, of course, marked, they have got the range and sections and townships and——

Q. And this is when you checked out as to where that—at the time you made up this affidavit, is the time when you checked it off on this map, is that right? A. Not on this map.

Q. Well, on the map?

A. Something similar, I imagine, either a plat or a unit map.

Q. You didn't check it out at the time you saw the sheep then, is that right?

A. Well, I imagine at that time I was very much more familiar with that area because I was operating in that area and since then I am operating in a different area altogether.

Q. In other words, this map, this affidavit made in 1956 was made from your recollection, is that right?

A. No, I said it was made from copies of leases that we held and from plats and maps, because after a period of time as long as that, you would have to resort to something factual to know what you are doing and in making an affidavit I am positive that I went, [130] I wouldn't sign any, I wouldn't sign my name to anything that was false.

Mr. Jones: That is all.

(There being no further questions, the witness was excused.) [131]

MR. JOE CORMIER

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified on direct examination by Mr. Galles, as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. Joe A. Cormier, and my residence is here in Billings, and I live at the ranch in the summer.

Q. You are a rancher? A. Yes, sir.

Q. What kind of a ranch do you have?

A. Grain and livestock.

Q. Where is it located?

A. It is on the Crow Reservation.

Q. Are you in partnership with your brother Clem Cormier? A. I am.

Q. And he was the witness that just testified?

A. He was.

Q. He made some reference to this 1945 count of sheep on Sections 12 and 13, in Township 4 South, Range 25 East. He also said that you were the lease man of the partnership? A. That is right.

Q. Would you have any record with you that would show whether that, whether those sections were under lease or permit, Mr. Cormier?

A. Yes, I don't have any records, I have memory of it. [132]

Q. Well——

A. What particular date are you referring to now?

Q. On or about June 12th, 1945?

(Testimony of Joe Cormier.)

A. And what description of land?

Q. That is Sections 12 and 13, Township 4 South, Range 25 East?

A. All of the land in those two sections?

Q. Yes.

A. Could I have a map for reference?

Mr. Jones: Your Honor, we will object to any testimony of this witness in reference to what he knows about the ownership or leasing of Sections 12 and 13, on the grounds and for the reasons that no proper foundation has been laid, and that it is not the best evidence.

Mr. Galles: Well, the witness says he can remember.

The Court: Yes, counsel went into that quite thoroughly with the other witness and I think I will permit him to answer—objection overruled.

Q. Would this map be of assistance to you, Exhibit 1, or maybe we need Exhibit 3 at this point, oh no, maybe this is the one, would Exhibit 2 be of assistance?

A. Is this, what exhibit number, this is Exhibit 2?

Q. Yes. [133]

A. This will partially help, although this code here has reference to dates 195——

Mr. Jones: Just a minute, your Honor, I would like to ask a question on voir dire.

The Court: All right.

(Testimony of Joe Cormier.)

Voir Dire Examination

By Mr. Jones:

Q. In other words, you are going to testify from this code in Plaintiff's Exhibit No. 2?

A. This code will not apply to the land that you are asking the question about as of June 12th, 1945.

(Continuation of direct examination by Mr. Galles.)

Q. All right, with that understanding, will you proceed then, please?

A. There was one allotment of land in that area if I could have reference to an allotment then, I could tell you the different pieces of ground that was not in the unit permit, the rest of it was in there.

Q. Do you have such an allotment map with you? A. Yes, I do.

Q. Would you get it, it is your property and your map?

A. It is—allotment of George Shows Little, that portion of it that lays within Section 13, was not in the permit.

Q. How much area of Section 13 is that allotment? [134]

A. One hundred and twenty acres.

Q. And in which portion of Section 13?

A. It would be along the southern boundary of Section 13.

Q. Then was all of the other Sections, were all

(Testimony of Joe Cormier.)

of the other Sections, 12 and 13, except that 20 acres in the permit? A. Yes.

Q. And permitted to whom?

A. Cormier brothers.

Q. Would you take the document that is on the reporter's desk, Motion for Preliminary Injunction, and toward the back of that document, is an affidavit which is purported to be executed by you, would you state whether or not you did execute that affidavit?

A. On page 2?

Q. On page 2 of the affidavit that you executed, appears your signature.

A. Here is one bearing my signature.

Q. You did execute that affidavit?

A. I will read it, yes, that is my affidavit.

Q. Calling your attention to January 30th, 1952, did you make a livestock count on that day out in your area? A. Yes, sir.

Q. Would you state what you did and saw?

A. I counted about 300 head of cattle, branded VC and [2].

Q. Was anyone with you?

A. My brother and Mr. Powers.

Q. And on what land was the cattle located, if you know?

A. According to the affidavit, it describes the land here.

Q. Well, do you recall from your——

A. Yes, I recall but I couldn't tell you those exact descriptions without having reference to something that I made record of at the time.

(Testimony of Joe Cormier.)

Q. When you made this affidavit, you knew that the land description contained in there was correct?

A. Positively identified, I went with Mr. Powers and we checked the corners on these, the stones, the quarter corners and the section corners on these lands that we described in the affidavit.

Q. And what is the description of the land on which you found this 300 head of cattle?

A. Specifically, the West Half of the Northeast Quarter of Section 3, and the North Half of Section 4, all in Township 4 South, Range 26 East, and the North Half of the Southwest Quarter, and the Northwest Quarter of Section 31, the Southeast Quarter of Section 32, the South Half of the South Half of the Northeast Quarter, and the South Half of Section 33; the West Half and the Southeast Quarter of Section 34, all in Township 3 South, Range 26 East. [136]

Q. Whose land was that?

A. They were under lease to Cormier brothers.

Q. From whom?

A. From—through permit and competent leases, through permit from the Crow Agency and competent leases of the competent Indians that owned the lands in that, in those descriptions.

Q. Do you know whose cattle, whose those 300 cattle branded VC and [2], they were?

A. Well, the VC were Mr. Fraser's, and from the information I gathered on the recording of the [2] brand, they belonged to Mr. Linderman.

(Testimony of Joe Cormier.)

Q. Do you know how much of each head there were with the different brand?

A. As of what date?

Q. On January 30th, 1952?

A. I don't recall that, on January 30th, we wrote down an accurate count as to each particular brand.

Q. Then all you can say now, there was so much of each? A. That is right, principally VC.

Q. More VC brands than [2]?

A. Many more.

Q. What proportion can you, can you give an estimate?

A. I would say three to four to one.

Mr. Jones: Just a minute, your Honor, we will ask that that be stricken on the grounds and for the reasons that the [137] question has been asked and answered, he didn't know, he didn't break them down.

The Court: Objection overruled.

Q. Now, referring to the following day, January 31st, 1952, did you make a count of livestock on land in the vicinity of your ranch? A. Yes.

Q. Who was with you then?

A. My brother and Mr. Powers.

Q. What did you find?

A. Oh, we found 28 head of cattle branded with a [2] and 27 head of cattle with the VC.

Q. Where were they located?

A. In the Southwest Quarter of Section 33, in Township 3 South, Range 26 East.

(Testimony of Joe Cormier.)

Q. Your affidavit says 27 East, but it should be 26 East?

A. That is a typographical error, it should be 26 East.

Q. Whose land was that?

A. It was Cormier brothers, permit land or competent leased land.

Q. All right, did you find other cattle on the 31st of January, '52?

A. Well, that was all, January 31st.

Q. I notice your affidavit says, and 28 cattle branded [2], right ribs or VC right ribs grazing on Lots 2 and 3, Section 31?

A. I believe I answered that earlier. [138]

Q. Oh, did you, whose land was that then?

A. Cormier brothers.

Q. And was that under permit or lease?

A. Either permit or competent lease.

Q. Do you know which?

A. I couldn't identify it from the map.

Q. From the map you have on front of you?

A. Yes, sir.

Q. Would you do so, please?

A. I will have to have the one, the map covering the 3 South, 26 East.

Q. I will hand you Plaintiff's Exhibit No. 2.

Mr. Jones: Just a minute, could I, which piece of ground are you talking about now?

A. Southwest of 33.

Q. Well, I would like to have you tell me on the lands described in your affidavit referring to Janu-

(Testimony of Joe Cormier.)

ary 31st, whether the land therein described is either under permit or lease?

A. Well, that is the Southwest Quarter of Section 33, and Lots 2 and 3 in Section 31.

Q. Yes.

A. I would need the Indian allotment map to identify the land that was in the permit schedule.

Q. Now, where——

A. I have a copy. [139]

Q. You have your own records that you can testify from? A. Yes, sir.

Q. Will you get them please?

A. (Witness complying.) The Southwest Quarter of Section 3 in 3 South, 26 East was land under permit.

Q. All right, as to Lots 2 and 3 in Section 31——

A. I need one more map, I see here that the descriptions call for Range 27 East, could I check the map in Range 27 East to——

Q. Well now, no, the one I am referring to is where you said you found the 28 head of cattle on Lots 2 and 3, if that is the last line of your affidavit, which is Section 31, Township 3 South, Range 26 East?

A. I believe that is a typographical error.

Q. All right, where did you find the cattle that is the 28 head branded [2] or VC?

A. They would be immediately——

Mr. Jones: Just a minute, your Honor, we will object to any testimony in reference to Section 31, Lots 2 and 3 in Section 31, Township 3 South of

(Testimony of Joe Cormier.)

Range 27 East, on the grounds and for the reasons that it is incompetent, irrelevant and immaterial. It is not one of the issues in this case, it comes as a complete surprise to this defendant, to any trespasses in that area, this thing was went into at the pretrial conference, and the land was [140] determined, and we have no knowledge whatsoever as to any trespasses in 3 South of Range 27.

The Court: Objection sustained.

Mr. Galles: Well, your Honor, we did not allege in our complaint where the trespasses took place, and as I recall the pretrial order and agreement was just that certain lands would be agreed upon, in fact it wasn't covered in the order, we agreed among ourselves that these three maps, Exhibits 1, 2 and 3, could be received in evidence. What I am trying to do is to show it——

Mr. Jones: Well, your Honor, I frankly think there is no mistake, I think all along that it has been 3 South of Range 26, and not 27.

Mr. Galles: That is a matter then you could go into on cross-examination, isn't it?

Mr. Jones: I don't think that it is relevant, as to 3 South of Range 27, we have been taken completely by surprise, we don't know what happened in that.

The Court: This, I presume this relates solely to the question of injunction doesn't it?

Mr. Galles: Yes, that is right, it [141] is on the injunction, count——

The Court: The affidavit in support of the preliminary motion for—would refer to specific land,

(Testimony of Joe Cormier.)

I think that is the point that Mr. Jones is making.

Mr. Jones: Well of course it goes into this question of injunction, and I think in our pretrial brief, this whole question is whether, being raised, is whether or not it is competent land, or office leased land, or strictly permitted land, as to whether or not this regulation applies. If it applies at all, and we do not have any information whatever as to anything in Lots 2 or 3 in Section 31 of 3 South 27, we don't know whether it is permitted or whether it was leased land, and this witness has no records, actually the whole reason that this testimony in reference to these leases or permitted land is being allowed in, is the fact that we did go into the office at Crow Agency, and these maps, we have, pretty well show what the holdings were, and for us to go into something that is not involved in here, maybe we didn't enter into it any— —

The Court: Well, there is—the court recalls there was a correction at the pretrial [142] conference but——

Mr. Jones: No, that is not this land, your

The Court: One tract of land, there was a typographical error, that is not this land is it?

Mr. Jones: No, that is not this land, your Honor.

Mr. Galles: What we are attempting to do by this witness, is, he stated that he found 28 cattle, he stated what the description was according to the affidavit, and then when he goes to determine whether it is permitted or leased, why he finds a

(Testimony of Joe Cormier.)

mistake and I think he is entitled to explain where he found the cattle, or if there was a mistake in the description he previously testified to.

The Court: On the other hand, the defendant has not had an opportunity to check the other land, that is not described in the affidavit, I think he should be given that opportunity if that goes in.

Mr. Galles: Of course, our contention is that the affidavit attached to the motion for preliminary injunction is not part of the pleadings in the case, we are going to trial on the complaint, the answer and the pretrial [143] order, and this is evidence within the framework of those pleadings, I don't believe we are bound by the affidavits attached to the motion.

The Court: Well, now is it the position of the Government, that any land could be, that the witness could go into any land whatever at this time?

Mr. Galles: Any land on the dates alleged, and the number of cattle alleged in our complaint wherever he found on January 30th, now he is, there is testimony to amend the pleadings by one day, we have alleged January 30, 1952, he said it was January 31st, but there are 55 cattle; now we don't allege where those cattle were in our complaint. Incidentally, our affidavit for preliminary injunction specifies where, but I don't believe that binds us in this, in the trial of this at this stage of the game.

The Court: Well, I will permit him to answer for whatever it may be worth.

(Testimony of Joe Cormier.)

Q. Mr. Cormier, referring to the 28 head of cattle that you found on January 31st, branded [2] right ribs, or VC right ribs, can you state now the legal description of where you found the 28 head?

A. It would be the land immediately south of the first location, Lots 3 and 4 in Section 4, of Township 4 [144] South, Range 26 East, the cattle were more or less in one spread out group, and this 28 head lay to the south side of the township line that divides its last description from the first description.

Q. Now, I want to call your attention to the fact in your affidavit, executed on the 2nd day of May, 1956, which is attached to the motion for preliminary injunction, you stated that 28 head was found by you on Lots 2 and 3, Section 31, Township 3 South, Range 26 East; can you explain the difference in those description?

A. I can only say that there are errors in printing.

Q. Do you know where these, the description of Lots 2 and 3, Section 31, was obtained, did you furnish that description in the first place for the preparation of this affidavit?

A. Not Lots 2 and 3, Section 31.

Q. How far away from the land described in the affidavit is the land that you have orally testified to, Lots 3 and 4 of Section 4?

A. Oh, I would say it would be a couple of miles.

(Testimony of Joe Cormier.)

Q. Who had the land, had the control or ownership or otherwise of the land on which you found the 28 head that you have orally testified to?

A. As of which—that I orally testified, Cormier brothers under permit.

Q. Under permit? [145] A. (No reply.)

Q. Referring to February 13th, 1952, did you have an occasion to make a livestock count in the area of your ranch? A. Yes, I did.

Q. How many cattle did you find?

A. 49 cows branded VC on the right ribs.

Q. And what location?

A. North Half of the Southest Quarter of Section 33, Township 3 South, Range 26 East.

Q. And who had the ownership or control of that land? A. Permitted to Cormier brothers.

Q. Well, you state in your affidavit that it was under lease, did you distinguish being permitted and under lease?

A. Well, technically, I suppose there is a distinction, but we refer to lease and permit in the same light, as exercising control.

Q. All right, did you observe any other cattle that day?

A. Thirty-three cattle branded VC on the right ribs and two steers branded [2] on Lot 2 of Section 4, Township 4 South, Range 26 East.

Q. Who had the control or ownership of that land?

A. That it permitted land to Cormier brothers.

Q. Who was with you on this day?

(Testimony of Joe Cormier.)

A. The 13th?

Q. Yes, of February, 1952? [146]

A. Mr. Powers and my brother.

Q. Mr. Powers testified to that when he was on the stand? A. Yes, he did.

Q. Going back to January 30th, 1952, which is in the forepart of your affidavit, in connection with 300 head of cattle, can you tell from the records that you have here, whether the land description that you testified to, where, who the lease, who had the lease or permit or control of that land?

A. The West Half of the Northeast Quarter of Section 4 is under permit to Cormier brothers.

Mr. Jones: Just a minute, I think for the record, he is referring to Section 3, aren't you?

Mr. Galles: I think for your convenience, I will read off the land description that you testified to, that is the West Half of the Northeast Quarter of Section 3, in 4 South, Range 26 East.

A. The West Half of the Northeast Quarter of Section 3 is under permit to, was under permit to Cormier brothers.

Q. On January 30th of '52? A. Correct.

Q. And the North Half of Section 4 in the same Township and Range? [147]

A. Under permit to Cormier brothers.

Q. The North Half of the Southwest and the Northwest Quarter of Section 31, of 3 South, 26 East?

A. Under competent lease to Cormier brothers.

Q. Southeast Quarter of Section 32?

(Testimony of Joe Cormier.)

A. Under competent lease to Cormier brothers.

Q. South Half——

A. Pardon, the last?

Q. The Southeast of Section 32, I think you answered competent lease on that one.

A. Well, I want to correct that, that is Southeast of 32, is permit land to Cormier brothers.

Q. All right, South Half of the South Half of the Northeast of Section 33?

A. That was under permit to Cormier brothers.

Q. And the South Half of the same Section?

A. Under permit to Cormier brothers.

Q. The West Half of the Southeast Quarter of Section 34?

A. Under permit to Cormier brothers.

Mr. Galles: That is all, you may examine.

Cross-Examination

By Mr. Jones:

Q. Mr. Cormier, I think we have some testimony in reference to trespassing on Lots 2 and 3 of Section 31, 3 South, of Range 26 East, and you said that [148] was a mistake in description, is that right? A. Lots 2 and 3 of Section 31?

Q. Yes. A. That is right.

Q. That is a mistake, there wasn't, you didn't find any cattle in there, is that right?

A. That is right.

Q. And you were with Mr. Powers all of the time, is that correct, I mean Mr. Powers and your brother were with you, weren't they, when you

(Testimony of Joe Cormier.)

were in there? A. Yes.

Q. And these cattle, these 28 head of cattle, were found in, was it Section 4 of Township 4 South, Range 26, is that right, instead of over in Section 31? A. Yes, in Section 4.

Q. Then Mr. Powers is wrong when he testified to the fact that they were in Section 31, is that right?

Mr. Galles: I don't think he testified to that, Mr. Jones.

Mr. Jones: Yes, he did.

The Court: Yes, he did.

Mr. Galles: Well that was on an affidavit.

The Court: This was, I have kept track of under count six, at least I have a notation there of Lots 2 and 3, Section 31. [149]

Mr. Galles: Oh, that is right, I beg your pardon.

A. I may not have been with him when he saw cattle, where he said he saw them, however, I do recall that he was there that day, and that I was with him at different times.

Q. I believe that you testified you and Mr. Powers and your brother definitely located all these corners and quarter corners, is that right, positively establish the location of when you saw these cattle, is that right? A. Yes.

Q. In other words, you located the corner lines in Sections 32 and of the—you've located the section corner at the Southwest corner of Section 33, 3 South, of 26 East, did you?

A. On the South Half of Section 33.

(Testimony of Joe Cormier.)

Q. Yes, the Southwest corner of that section?

A. Yes, we generally located all the corners in the area under discussion.

Q. Located—you went there and you dug around and found it, is that right? A. Yes.

Q. What does that corner look like, do you know, do you recall?

A. That is a rock survey, all the markings there are rocks. [150]

Q. Is it a rock? A. Yes, sir.

Q. Is it a big rock or is it a buried rock, or what does it look like?

A. Well, they are generally rocks that are common to the area, where the survey is made, and they will run eight to ten inches high and stuck in the ground.

Q. How about this rock, do you recall what that rock looked like?

A. I don't recall definitely what that rock looked like.

Q. Well, was it easy to locate?

A. Comparatively easy.

Q. What do you mean by comparatively easy?

A. In many cases there are piles of rock placed along the survey rock.

Q. Was it a pile of rocks in this instance, that is the Southeast Quarter of Section 33, 3 South of Range 26?

A. At that particular instance, I am not positive.

Q. Not positive, how about the quarter corner

(Testimony of Joe Cormier.)

of the Southwest corner, that is the Southeast Quarter corner of the Southwest Quarter of Section 33, did you locate that rock?

A. The Southwest Quarter corner of Section 33?

Q. Yes. A. Yes.

Q. What, do you know what that rock looked like? [151]

A. Not in particular, just rock, with quarter mark on it.

Q. Well, did you locate these different lines between these forty acre tracts, any of those corners at the time?

A. Do you mean a sixteenth rock?

Q. Yes, I guess it would be a——

A. No, there are no sixteenth rocks in the survey there.

Q. In other words, it is just the quarter sections?

A. Quarters and sections.

Q. And did you locate the quarter corners in Section 34 of the Southwest corner?

A. Southwest of 34?

Q. Yes. A. Yes, sir.

Q. And did you locate the quarter corners of the Southeast of 34? A. Yes, sir.

Q. And did you locate the quarter corners, that is on this date, this time I am talking about when you and Mr. Powers and your brother were out there? A. Yes.

Q. Did you locate the quarter corners on the Northwest corner of Section 34?

(Testimony of Joe Cormier.)

A. Which corner of the Northwest Quarter?

Q. Well, all of them, as I understand you located all these corners, you really had her pinned down, is [152] that right, you located them all?

A. Yes.

Q. Now how about this Northwest corner, is that, those corners they are pretty easy to identify or——

A. Northwest corner of which section?

Q. Well these quarter corners in the Northwest Quarter, the four corners there, were they easy to identify? A. In which section?

Q. In Section 34, pardon me?

A. Northwest corner?

Q. Northwest Quarter, there were four corners, that constitute the quarter corners of the Section 34 there, of the Northwest Quarter?

A. You mean the center of the section, when you say is four?

Q. No, I mean these four quarter corners of the Northwest Quarter of Section 34?

A. By which stones are you referring to?

Q. I am referring to these four corners?

A. There are stones at this corner.

Q. Which corner is that now?

A. That would be the Northwest corner of the Southwest Quarter of 34.

Q. And 3 South of 26 East?

A. That is right, and there is a stone on the Northwest corner of the Northwest Quarter of Section 34, there is a stone on the Northeast corner of

(Testimony of Joe Cormier.)

the Northwest [153] Quarter of Section 34; there is no stone in the center of the section.

Q. And you located all these corners did you?

A. The ones I have just testified, yes.

Q. Well now, I think you also testified that you located these section corners in Section 33, is that right, the section corners?

A. That is correct.

Q. Now did you locate the corners over in Section 3 South, Section 31 of 3 South of Range 26 East?

Mr. Galles: Object to this as being repetitious, I don't know what the purpose is, if there is some purpose fine, but it would be irrelevant.

Mr. Jones: Oh, we don't think it's irrelevant, your Honor, they testified they located all of these, I am just——

The Court: What date is this on Section 3, I am getting confused.

Mr. Jones: On Section 3, I am referring to this date of January 31st of 1952.

The Court: Well is there any testimony with respect to Section 3 on that date, Mr. Jones?

Mr. Jones: I am talking of Lots 2 and 3, pardon me, of Section 31, that this land that he says was under competent lease. [154]

The Court: Hasn't he testified that that is in error, Lots 2 and 3 of Section 31?

Mr. Jones: Well, we will strike that.

Q. Were these quarter corners, these corners located on the ground or by map or by aerial photo-

(Testimony of Joe Cormier.)

graphs and by map, these lease maps such as you have here, is that how you located or did you actually locate them on the ground?

A. I located them on the ground, I am really familiar with that area, and I know where most of those stores are, and if I recall correctly, Mr. Powers had an aerial photo and he went to one of these points for a beginning, a check point, and made his observations from there.

Q. How long were you in this area on January 31st, 1952, with Mr. Powers?

A. Oh, maybe a couple of hours.

Q. How long were you in the area on January 30th, 1952? A. A couple of hours.

Q. And Mr. Cormier, your main recollection as to this description of this land, comes from the affidavit that you executed on May 2nd, 1956, is that correct, that affidavit you have in front of you?

A. Yes, and I remember, I remember distinctly.

Q. And you read that affidavit very carefully, just like you read it here at the time you signed it? [155] A. I presume I did.

Q. Well, do you recall whether you did or you didn't?

A. Well, I must have read it.

Mr. Jones: That is all.

(There being no further questions, the witness was excused.)

(Whereupon, the court took a short recess; court resumed pursuant to recess, parties present the same as before.) [156]

MR. JOE A. CORMIER

recalled as a witness on behalf of the Plaintiff, having been previously duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Mr. Cormier, during the short recess we have had, have you had an opportunity to go over your plat and affidavit again? A. I did.

Q. And when you testified that you saw these 28 cattle on Lots 3 and 4 of Section 4, 4 South of 26 East—— A. What section number?

Q. Section 4, I mean you said the affidavit was wrong and you saw these cattle on a different land description, what were you referring to when you made that conclusion?

A. Well in this, there are cattle all over that area, when we counted, I mean when we rode through there, there were cattle all over that area and Mr. Powers didn't count with me down there, however, he did count up here on 31.

Q. And you, the map you hold in your hand is that a large or small scale map?

A. Well, it is a small scale, it is identical with the—that large map back there, but I have difficulty in reading these lot numbers from this map, I need a reading glass really.

Q. During the recess, have you compared the small map with the larger map? [157]

A. I did.

Q. What have you to say now with where you

(Testimony of Joe Cormier.)

found the 28 head of cattle branded [2] right ribs, or VC, right ribs?

A. The affidavit is the correct description.

Q. And you recall having counted 28 head of cattle on the land described originally in the affidavit? A. I do.

Mr. Galles: That is all.

Cross-Examination

By Mr. Jones:

Q. I believe you testified, Mr. Cormier, previously that you went over in Section 31, is that right, that may be Mr. Powers' count on those, but you didn't?

A. I may not have been there at the same time.

Q. Oh, I see.

Mr. Jones: That is all.

(There being no further questions, the witness was excused.) [158]

MR. ORIE DOSDALL

called as a witness on behalf ofthe Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. My name is Orie Dosdall, and I live about six miles north of Pryor.

(Testimony of Orie Dosdall.)

Q. What do you do? A. I am a farmer.

Q. Do you have livestock?

A. A few head, yes.

Q. Is your farm on the Crow Indian Reservation? A. Yes, sir.

Q. All of it? A. Yes.

Q. Within the boundaries?

A. Within the boundaries of the Crow Indian Reservation.

Q. I will hand you an affidavit that you executed, Mr. Dosdall, which is attached to the Motion for Preliminary Injunction, filed in this action, and ask you if you recall having made that affidavit?

A. Well if my signature is on the bottom of it, I made it, I mean I signed it and everything is in there is true.

Q. Do you recall the morning of December 17th, 1955? A. I do.

Q. And what did you do and find with reference to a livestock count? [159]

A. Well, I found a bunch of Fraser's cattle, and Charlie Fraser's cattle in on my office and competent leases.

Q. How many?

A. You mean referring to this affidavit, or just offhand?

Q. Well, do you remember offhand?

A. Offhand, there was approximately 126 of VC, and [8] and [9].

Q. When you say that, you are referring to the brands on the cattle? A. Yes.

(Testimony of Orie Dosdall.)

Q. When you say that, you are referring to the brands of the cattle? A. Yes.

Q. And on what lands, by legal description, did you find the cattle?

A. Well, they were in 15, 16 and 17 of 4 South, Range 26 East.

Q. Those are section numbers you named first?

A. Yes, sir.

Q. Who owned or controlled that land?

A. I have some control over it.

Q. All of those sections that you have named?

A. 15 and 16, I do, and Northwest part of 17.

Q. And in what part of that description did you find these cattle? [160]

A. They were on the South part of Section 16.

Q. Now, do you have control of that land by permit or lease?

A. I have an office lease, office-approved lease, by approval of the Superintendent.

Q. Did you see any cattle at a later date in that same month?

A. Well, they were in and out of there so much, Mr. Galles, that they were in there continuously for two months, on wheat and barley.

Q. That was your wheat and barley on the land you have described? A. Yes, sir.

Q. And it was the cattle with the brands you have already described? A. Yes, sir.

Q. Was it the same herd that was in there during that period?

A. Yes, they were the same bunch of cattle.

(Testimony of Orie Dosdall.)

Q. And in your affidavit, when you state there was about a hundred head on December 17th, and December 24th, and January 21st of '56, and also up until March 6th of '56, do I understand that it was the same herd?

A. It was the same herd, there might have been a few head changed here and there, I run them out and then they would, well they took my gates and run them back in again, I mean just had no control over them. [161]

Q. Have there been other cattle, not belonging to you on your land, since March of '56?

A. Well, there has been, there was cattle run through after this restraining order was issued to Mr. Fraser, he wasn't supposed to have any cattle in there, why they took, I don't remember the exact date, but they took 350 head through me, it was, well I was seeding barley in March, it must have been around March 27th or 28th of '57.

Q. Of this year? A. Of this year.

Q. And did you identify those as cattle belonging to Mr. Fraser in any way?

A. Yes, they took them down along the fence, and I seen Fraser's men rounding them up, and Mr. Fraser's brother was in the lead with an International, a red International pickup.

Mr. Galles: That is all.

(Testimony of Orie Dosdall.)

Cross-Examination

By Mr. Jones:

Q. Mr. Dosdall, you are the same Mr. Dosdall who was involved in a legal action in District Court in reference to this land you have testified to, isn't that right? A. Yes, sir.

Q. And well, I think to save time, your Honor, I think that it is stipulated that that is part of [162] the record, and there is no use me going into it with this witness and that is all—with reference to this 350 head or so on March 27th, 1957, isn't it customary out there for one rancher to let another rancher pass through him, through his pasture out there?

A. No, not in this particular instance, Mr. Fraser won't obey a restraining order keeping them out of there, he just maliciously has taken cattle through there and horses through there, not at this time, but years before— —

Q. But there is the only time, do you know where he was going with his cattle?

A. No, I didn't know where he was going with them.

Q. Do they have land on the other side of you?

A. Yes.

Q. Have you been going through his land on the same kind of a proposition? A. No, sir.

Q. Been driving your trucks through his, across his land? A. No, sir.

(Testimony of Orie Dosdall.)

Q. Well, how do you get your wheat to Edgar, don't you go across his land?

A. Well, I suppose I drive the trucks on that public road there.

Mr. Jones: That is all. [163]

(There being no further questions, the witness was excused.) [164]

MR. CLARK C. STANTON

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name and what you do?

A. My name is Clark Stanton, and I now live at New Town, North Dakota.

Q. New Town, North Dakota?

A. Yes, sir.

Q. With the Bureau of Indian Affairs?

A. Bureau of Indian Affairs.

Q. Did you formerly work at the Crow Agency Office? A. Yes.

Q. In what capacity?

A. I was Range Conservationist.

Q. Did you have an occasion to make a livestock count on May 24th, 1954, on range unit No. 19?

A. Yes.

Q. Do you recall now what you did and what you found on that date, or would it be necessary for you to refer to a memorandum?

(Testimony of Clark C. Stanton.)

A. I will have to refer to my affidavit to get the exact numbers, but this count was made during the, just a routine check which we make each year, usually on all permits.

Q. I show you the affidavit on file in this case, attached to the Motion for Preliminary Injunction, and you may use that to refresh your memory; would [165] you state what you did and saw on that date?

A. I don't remember exactly where I entered, or where I left the unit, but anyhow I come, I believe I come from the Pryor road, the road from Highway 87 to the town of Pryor, and went through the unit to the north and west, and I counted cattle, the biggest majority of these cattle were above the rim on land permitted to in range unit 19.

Q. What date was this?

A. Well, May 24th of '54.

Q. How many cattle did you find?

A. I found 182 cattle, plus 32 horses.

Q. How did you identify the ownership?

A. The horses, I was unable to read brands because those horses were hard to get close to, you couldn't get close enough to read a brand, but the cattle I was able to read the brands on the majority of the cattle.

Q. What brands were they?

A. H inside of a circle, and a VC, those two brands of the cattle.

Q. And on what land were these horses and cattle found?

(Testimony of Clark C. Stanton.)

A. They were all, as I remember, they were all on land permitted through the office and range unit.

Q. Well, can you specifically, permitted to whom? A. To Mr. Fraser.

Q. Would that, do you know, may I have the complaint, your Honor, or rather, Exhibit 9, and I will hand you [166] Exhibit 9 and ask you if you found these horses and cattle on the land described in Exhibit 9?

A. I would have to look at that plat, because I have been gone for a year, and I can't remember exactly all these descriptions.

Q. All right, I will hand you Exhibit No. 3, which is a plat of unit 19?

A. I believe the Pryor road goes through here, this is deeded land, and the cattle were right on these allotments right here, the rim, if I remember right, the rim comes right through here, and the biggest majority were up above the rim, although there was some below the rim.

Q. You are referring to the plain yellow portion of about the middle of the unit?

A. That is right.

Q. On allotments number, which one on Exhibit 3?

A. 1879, 1817, and I believe it would be 2097, too.

Q. That is colored in yellow, either plain or with some circles on it, on Exhibit No. 3?

A. That is right.

Q. Did you compute how many animal units this

(Testimony of Clark C. Stanton.)

182 head of cattle and 32 head of horses amounted to?

A. Yes, the horses converted to cow units would be half again as many horses, 32 plus 16, using the ratio of 3 to 1.

Q. And how many animal units did that group of livestock [167] consist of?

A. The 182, plus the 32 head of horses, would equal 230 cow units, which is 107 cow units over the authorized capacity of the unit.

Q. One hundred and seven cow units in excess over the number authorized by Exhibit No. 9?

A. That is right.

Mr. Galles: That is all.

Cross-Examination

By Mr. Jones:

Q. Mr. Stanton, are you pretty well acquainted out there in this area?

A. Yes, I was, I have been gone a year, I believe I still can find my way around.

Q. When you refer to the rim there, do you know where that rim or bluff, whatever it is, is located, could you locate it on the map?

A. I could approximately, it doesn't run on a straight line, it makes a big circle from the north running south and east.

Q. Will you put it on this map here for us, please?

A. (Inaudible)—to get there exact, I would have

(Testimony of Clark C. Stanton.)

to have an aerial photograph, but I can give you approximately.

Q. Do you have an aerial photograph with you of this area?

A. The rims run out of the reservation here in Section [168] 27 and 28, the rim starts about here—and angles to the north, it starts right here and angles across, comes below, that is approximately where it goes.

Q. Approximately? A. Yes.

Q. I think probably we better have you draw it on this, Plaintiff's Exhibit No. 3.

A. Could I use that aerial photograph again?

Q. In other words, that line, Mr. Stanton, that line you have drawn here on this Plaintiff's Exhibit No. 3, is approximately where the wall or bluff is located? A. That is right.

Q. And that you have heretofore testified that these cattle were located, part of them above the bluff and some down below? A. Some below.

Q. Would you tell us, Mr. Stanton, where were these cattle, were they in a bunch or were they spread out all over?

A. The ones below the rim were more or less in a bunch, because they were on the reservoir, but the ones above the rim were spread out on oh for a mile probably.

Q. A mile, would that be a mile, just a mile in circumference, or a mile north?

A. A mile running northwest.

Q. A mile? [169]

(Testimony of Clark C. Stanton.)

A. They were kind of a long string, see, there is a coulee that runs up through there, and they were on both sides of this coulee and in the bottom.

Q. Were they moving up the coulee, or just grazing? A. Just grazing.

Q. And where is this, do you know where this waterhole is, this watering place is located in this area?

A. The big reservoir?

Q. Yes, where these cattle below the rims, where it is located?

A. I think I could locate it on the aerial photograph.

Q. Well is it, would you say it is in——

A. I would say it would be right in this area right here.

Q. In allotment 2097, or where these C's, are marked on Exhibit 3, and where it is marked "C," is that it?

A. It would be right close there, yes.

Q. Mr. Stanton, I believe that you testified that these cattle below the rims, do you know how many cattle there were?

A. No, I counted them altogether.

Q. They were counted altogether?

A. (No reply.)

Q. Could you point out in here where that, in this Plaintiff's Exhibit 9, where the allotment 2097 —oh yes, I see——

Mr. Jones: No further cross-examination. [170]

(Testimony of Clark C. Stanton.)

Redirect Examination

By Mr. Galles:

Q. I notice there are several letters "C" on this Exhibit 3, where you said that the large reservoir was, I wonder if you would circle the one where you think the reservoir is closest to?

A. I would have to look at that photo.

Q. I don't mean to locate it exactly, I was just wondering which "C" you were referring to when Mr. Jones was questioning?

A. The closest I can get right here, would be that, it would be in this general area, someplace in here.

Q. Would you put a circle where you are referring to when Mr. Jones was questioning you?

A. It would be around close in there.

Mr. Galles: That is all.

(There being no further questions, the witness was excused.) [171]

MR. DONALD F. FIELD

called as a witness on behalf of the Plaintiff, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name and where you live?

A. My name is Donald F. Field, I live in Billings, Montana.

(Testimony of Donald F. Field.)

Q. What do you do?

A. I am the Range, Area Range Conservationist for the Bureau of Indian Affairs.

Q. Does that include the Crow Indian Reservation? A. Yes, sir.

Q. Among others? A. Yes.

Q. There has been testimony in this case that there has been over-stocking of a certain range unit and contract, and I will ask you if you are familiar with plaintiff's Exhibit 9, with the attachments?

A. I am familiar with that Exhibit.

Q. Did your office send any letter to R. B. Fraser, the permittee, in that Exhibit 9, for the over-stocking that has been testified to in this action, particularly we will start with May 24th, 1954, event of over-stocking?

A. I would like to have the privilege of looking at the file.

Q. Yes, you did bring a file with you from your office?

A. I have the Area Office file with me. [172]

Q. Is that the official records of the office?

A. It is.

Q. Maintained in the regular course of business?

A. That is right.

Q. And you are the custodian of the file?

A. I am.

Q. Would you see if you can find anything in the file on that matter?

A. Well, on November 26th, 1954, Mr. Fraser was mailed a registered letter, return receipt requested.

(Testimony of Donald F. Field.)

Q. Do you have a copy of that letter?

A. I have a copy of the letter.

Q. And do you have a copy of the return receipt?

A. I have a copy of the return receipt.

Q. Can you extract that from your file, Mr. Field, as an exhibit? A. Yes, sir.

Q. I have had the copy of the letter and the return receipt marked Plaintiff's Exhibit No. 12, and I will ask you to state what this is, Mr. Field?

A. Well, this is a duplicate original of a registered letter dated November 26th, 1954, signed by Mr. J. M. Cooper, the Area Director of the Billings Area Office, it is mailed to, addressed to Mr. R. B. Fraser, in care of R. B. Fraser, Incorporated, 2015 First Avenue North, Billings, Montana.

Q. What about the card attached, what is [173] that?

A. The attached card is the return receipt, receipt upon delivery of the registered letter.

Q. It is not signed by Mr. Fraser, but apparently someone for him.

A. The name R. B. Fraser appears here, but the name Don Scott, under it, it is dated November 27th, 1954.

Q. That is one day after the letter is dated?

A. One day after the letter was dated.

Q. And what is this letter, purport to do, what was the occasion for writing to Mr. Fraser?

Mr. Jones: Just a minute, your Honor, we will object to this on the grounds and for the reasons that no proper foundation has been laid as to

(Testimony of Donald F. Field.)

whether this witness was present, or certainly not the author of the letter.

The Court: Objection sustained.

Mr. Galles: Well, we will offer in evidence Plaintiff's Exhibit No. 12, I think it speaks for itself anyway.

Mr. Jones: We would like to ask counsel for the plaintiff what is the purpose of this?

Mr. Galles: To show demand for the payment of the amounts alleged in our complaint and our next question will be, whether or not it has been paid.

Mr. Jones: Well, your Honor, this [174] letter, we object to it on the grounds it is incompetent, irrelevant and immaterial, for the reason that it is highly prejudicial, and conclusion, that, and is, the other contents are prejudicial to the plaintiff's or the defendants' position, more prejudicial than it is enlightening.

The Court: The court understands it is offered for the purpose of showing a demand.

Mr. Galles: Yes, your Honor.

The Court: For that purpose it will be received and the objection is overruled.

Q. Mr. Field, do your records show whether or not any payment has been made for the demands for over-stocking as alleged in counts 7 and 8 of this complaint, that is, for the over-stocking of May 24th, 1954, and of November 4th, 1954?

A. Our records show that no payments have been received.

Q. Now we have alleged in our complaint that

(Testimony of Donald F. Field.)

the sum of $687.51 should be credited by reason of a bond posted, was that bond, is that bond posted in your office or available to be credited to the amounts, the amount asked for in count 7?

A. Could I have a copy of that complaint, I don't seem to——

Q. Well, I will just tell you that in count 7, which is the count alleging over-stocking of Mr. Fraser's [175] contract, permitted land, of May 24th, 1954, shows to be a total amount due according to that letter that was just identified and received, of $2,693.19, and the next delegation is that a portion of those penalty and fees were paid by a bond, and that the sum of $687.50 should be credited; do you have any record of that?

A. The record will show that cash bond in the amount of $187.51 is now on deposit with the Superintendent of the Crow Reservation, and that negotiable treasury bond in the amount of $500.00 is filed and is on deposit in Washington, and is being held there pending the outcome of this case.

Q. And outside of those deposits or bonds, no amount has been paid?

A. To my knowledge.

Q. On these two counts?

A. To my knowledge no money has been received.

Q. Mr. Field, there has been some evidence that the contract as portrayed by Exhibit 9 has been cancelled, do you have any record when this contract was cancelled?

(Testimony of Donald F. Field.)

A. Yes, sir, this Exhibit will show the date on which the cancellation was effective.

Q. That is Exhibit No. 12 that you just identified? A. Yes, sir.

Q. What date was the contract cancelled? [176]

A. This letter shows that the contract was cancelled effective December 31st, 1954.

Q. Had all of the grazing fees and payments, as required by the contract, been paid, as of the date of cancellation? A. No, sir.

Q. What was due and owing, if anything?

A. Well, the entire annual fees for the remaining one year, the permit where due and payable, however, inasmuch as the unit, the grazing permit was being cancelled effective December 31, one month grazing fees were due and payable.

Q. And what could that amount to?

A. $114.64.

Q. Was that amount paid by Mr. Fraser?

A. Not to my knowledge.

Q. Was a demand made upon him for payment?

A. A demand was made in this registered letter of November 26th, 1954.

Q. Now that amount of $114.64 is due, in addition to the other amounts that is set forth in the letter, which is the same as in the complaint, is that correct, I am referring to the bottom of page 2?

A. That is correct.

Mr. Galles: You may examine.

Mr. Jones: No cross-examination. [177]

* * *

Defendants' Case-in-Chief

MR. R. B. FRASER

called as a witness in his own behalf, as the Defendant herein, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. Will you state your name please?

A. R. B. Fraser.

Q. Are you the same R. B. Fraser who is one of the defendants in this action?

A. Yes, sir.

Q. And do you own land, own and lease land on the Crow Indian Reservation?

A. Yes, sir.

Q. And did you own and lease land on the Crow Indian Reservation in December, on December 31st, 1943?

A. I leased land, I don't know whether I owned any.

Q. You leased land at that time?

A. (No reply.)

Q. Did you own any sheep in December, on December 31, of 1943? A. No, sir.

Q. You did not? A. No, sir.

Q. You have heard the testimony by Mr. Urban Landon, in reference to some sheep having trespassed on December 31st of 1943, on the Crow Indian Reservation? A. Yes, sir.

Q. And that these sheep were branded circle

(Testimony of R. B. Fraser.)

F, and is that your, was that your brand at that time? [181]

A. Well, they don't register sheep brands.

Q. Do you recall, did you at any time own these sheep, these 1,085 head?

A. Well, I owned some sheep, I don't know whether these are the ones or not. I dealt some sheep to Jaffrays, and I suppose that he used the same brand that I had previously, which was circle F.

Q. And who was Mr. Jaffrays?

A. He owns some land out in the neighboring reservation, in neighboring Indian reservation, and in 3, 26.

Q. Did you say you transferred these sheep, transferred some sheep to Mr. Jaffrays?

A. I dealt them to Mr. Jaffrays.

Q. Do you know how many sheep you dealt to Mr. Jaffrays? A. I don't exactly.

Q. Do you know how many sheep that you sold to Mr. Jaffrays?

A. I don't, I traded to him for his ranch out there, and I don't know how many were included in that deal, it has been quite awhile ago, I had a band and I don't know how many, usually bands is around a thousand or twelve hundred sheep.

Q. The plaintiff's witness, Mr. Urban Landon, has testified that they found 2,200, found 1,085 sheep in the Southeast Quarter of the Northeast Quarter of Section 36, Township 3 South, of Range 26 East, do you have any, did you have any sheep on December 31st, 1943, [182] in that area?

(Testimony of R. B. Fraser.)

A. No, sir.

Mr. Galles: What was your answer?

A. No, sir.

Q. Did you have any sheep, did you have 2,000 head of sheep on Section 12, Township 4 South, of Range 25 East at that time? A. No, sir.

Q. Did you own any sheep being grazed on the reservation at that time?

A. I dealt them to Jaffrays, and he was running them out there.

Q. Do you recall when you dealt them to Mr. Jaffrays?

A. Well, it was around '40, I think, in the 40's, quite early in the 40's, but I don't know the exact date, no.

Q. Do you know whether it was in the year 1943, or not? A. No, sir.

Q. Do you know whether Mr. Jaffrays was running any sheep on his own or your land, did he have permission to run his sheep on your land in 1943?

A. We traded, traded leases, I had some leases and he had some leases in 3, 26, in Township 3 South, Range 26 East, and I had some in there, and he used mine and I also had some cattle that I was running his, and we traded grass.

Q. Did you own any land in 4 South, Range 25 East at this time, in 1943?

A. His ranch, that he was dealing me, that he had dealt me, was in there, was in 4, 26, or 4, 25, yes.

(Testimony of R. B. Fraser.)

Q. When you run sheep, did you have them branded with an 8 at any time?

A. No, I think that was Jaffray's own brand, he had previous to the time that I dealt with him, Jaffrays was an old sheep man, and had sheep previous to the time when I dealt with him on the ranch.

Q. Did Mr. Jaffrays work for you in 1943?

A. No, sir, he was his own man, oh I imagine he looked after cattle a little for me, if they were out there, he would tell me about it, we neighbored that way.

Q. Did Mr. Westburg work for you in 1943?

A. I think when I first got the band of sheep from up in the Judith Basin, Westburg come down with them and then I turned him over to Jaffrays, and Jaffrays told him what to do and run him from then on.

Q. And do you remember when that was?

A. Well, I can't say exactly, but it was in the early 40's when I dealt with, when I dealt with Jaffrays, why he took the sheep, why as I remember it, Westburg went with him at the time and then he was called to the army or something, I don't remember just the dates.

Q. Was Mr. Westburg working for you on December 31, 1943? [184] A. No, sir.

Q. Mr. Fraser, I hand you Plaintiff's Exhibit 3 and ask you if you will identify from that exhibit, the land that in 1952 through '54, and up and down to the present date, that you owned and had leased?

(Testimony of R. B. Fraser.)

A. Yes, sir.

Q. Will you state what allotments and what land you had leased in this area, from this exhibit?

A. Well, the land in Section 2, and the allotment number, I think, what is that, 1452——

The Court: Mr. Jones, I think we will suspend now, the court agreed that the Billings Gas Company, or whatever it is, might run the jackhammer from noon until 2:00 o'clock. They have held up by reason of the court proceedings, but I hear it now and I'm afraid it is going to interfere with our examination, so court will recess until 2:00 o'clock.

(Whereupon, court recessed for noon; court resumed pursuant to recess at 2:00 o'clock p.m., parties present the same as before.)

(Mr. R. B. Fraser resumed the witness stand for further direct examination by Mr. Jones as follows:)

Q. You are the same Mr. Fraser who has heretofore testified before the recess? [185]

A. Yes, sir.

Q. Mr. Fraser, I hand you Plaintiff's Exhibit No. 2 which is a plat map, showing Sections 12 and 13 of Township 4 South, Range 25 East, and ask you if you know, if you recall who had Sections 12 and 13 leased in, or if anyone did in 1945?

A. Crawford had 13.

Q. Who is that?

A. Crawford, O. W. Crawford, I think it is.

(Testimony of R. B. Fraser.)

Q. Did you have any land leased in this area at that time?

A. Yes, I had my lease right south of 13, and I also had some leased in 14, the quarter section in 14, and Mr. Jaffray's land was in 10 and 11, right next to it.

Q. Was this area fenced at that time?

A. I think there was a fence as I remember it, there was a fence between, run between the south, of the South Half of Section 12 and 13, took in the bottom layer of the south 40's, and 12 and all of 13, all in one pasture, that was the north fence, and then there was a fence went right along on the east side of 12 and 13, 13 especially, there was a fence with a stockpass in 13, and there might be a stockpass there, between, with a gate in it, and 13, and I am not sure, I was fenced off from 13 or not, but I had, I run together with Crawford, I had an agreement with Crawford. We run our livestock together, more or less. [186]

Q. Now, I call your attention to the testimony by Mr. Joe Cormier, in reference to having seen three hundred head of cattle branded [1] right ribs, or Lazy Bar L, right ribs, grazing on the West Half of the Northeast Quarter of Section 3, and the North Half of Section 4, in Township 4 South, Range 26 East, M.P.M.; can you locate that on that map and will you state as to where your land is located in relation to this area?

A. Well, I have, I had land, that is considerable

(Testimony of R. B. Fraser.)

land, west of it, some land north of it, and no fence between.

Q. And can cattle pass freely from one, this area, in this area, the West Half of the Northeast Quarter of Section 3, and the North Half of Section 4, to and from your land that you have leased?

A. They did, and many of Cormiers cattle were over in my part of the ranch.

Q. Is there any water in this West Half of the Northeast Quarter of Section 3, and the North Half of Section 4?

A. There is some water along there, I can't, I can tell you along in 3 and 4, and there is water west of there in mine, there is plenty of water all through there.

Q. Now, I call your attention to the North Half of the Southwest Quarter in the Northwest Quarter of Section [187] 31, Township 3 South, of Range 32, Range 26 East, have you located that area?

A. Is that 31 you say?

Q. Of Section 31, yes?

A. That is lots, wasn't it?

Q. Well, it is described here, they are described both as Lots 2 and 3, and the North Half of the Southwest Quarter, and the Northwest Quarter of Section 31, can you locate that? A. Yes.

Q. And where in relation to these areas is your land located?

A. On the west side of it, the reservation fence, and on the east, south and north of it, on my leases, this piece of land sets up on a hill, and the only

(Testimony of R. B. Fraser.)

thing I can go up there—is in a breeze, it gets too hot, it is rough and hilly up there, and it is not fenced out, it is still in there, the same way, it is not fenced away from the rest of my lease.

Q. Now, I refer to the West Half and the Southeast Quarter of Section 34, in Township 3 South, of Range 26, can you locate those on the Exhibit?

A. What is that you say?

Q. The West Half and Southeast Quarter of Section 34.

A. It is here, do you want me to locate here you say?

Q. Well, where in relation to this land description is your land located? [188]

A. I have the North Half of 33 adjoining it practically, there is a little piece, a little offset there in the north, the Northeast Quarter of Section 33, at that quarter section, that sets up into, into 28, and about part way, it is an offset quarter section.

Q. And where else in there do you have land leased or——

A. And I have adjoining, I have 23, I have some more in 28, I have the Northwest Quarter of 28, and practically all of 29, and part of the south part, most, the south, the south of the South Half of 30, and also the north, the Northeast Quarter of the Southwest Quarter of Section 30, and as in 31, I am all around that land you mentioned, the time before, I am all around that, 31.

Q. Is there any fencing in this, between this

(Testimony of R. B. Fraser.)

land, the alleged trespass and your land, was there in January 30th of 1952?

A. Which are you talking about?

Q. Between your land and the West Half and the Southeast Quarter of Section 34?

A. No, sir.

Q. Could you describe, do you recall the fencing in that area in January of 1952, if any?

A. Well, there was a—some grain land that was south of this, these sections you are talking about, and that was fenced, there is a north fence between them [189] and the rest of it, but practically all the land we have been talking about so far, there was no fence between it, it was part of it Cormier's, and part of it mine, and no fence apart, they run cattle in there and so did I.

Q. Now, I call your attention to the Southeast Quarter of Section 32, and the South Half of the South Half of the Northeast Quarter, and the South Half of Section 33, this land is located in the very same vicinity; isn't that correct?

A. Yes.

Q. And do you know what the fencing conditions were on January 30th, 1952, in this area?

A. Well, there wasn't any fences, I was talking about previously, that is the same territory you was talking about before.

Q. And is it not true, Mr. Fraser, that your cattle put on your own land or Mr. Cormier's cattle put on his land, either the Cormier brothers or any cattle that are put on any of this land, can travel

(Testimony of R. B. Fraser.)

back and forth from one area to the other, is that correct? A. That is right.

Q. Now, where is the water located, the water holes located in this area, if any?

A. Well, there is water holes all west of the spring wells, west up in this 30 and—— [190]

Q. Could you locate it as close as possible, if need be, use your plat book, but we would like you to locate those?

A. Well, there is a spring runs in the South Half of the South Half of 30, and there is spring runs on 23, the North Half, the North Half, or 29, pardon me, 29; there is spring both on the north and the south, towards ravines in both of them, and then there is some other springs down here in the dam, I think, down in 6, springs in through there, and through, I don't know, this isn't labeled, but it is 6.

Q. That is in—— A. Seven.

Q. 4 South of 26?

A. Well, there is some springs in there, there is lots of water, and springs and dams all through both the Cormier's and my own, my own leases.

Q. Since January 30th of 1952, has this area been fenced by anybody?

A. Since then you say?

Q. Yes. A. Yes, sir; part of it.

Q. Do you know who fenced it?

A. I fenced most of it.

Q. And could you——

A. Between us, although Cormiers fenced off a

(Testimony of R. B. Fraser.)

section there, I would think that is section 32. [191]

Q. Could you describe where this fence, the fence that you built, runs?

A. I run a fence from between 4 and 5, North and South.

Q. What township and range? A. What?

Q. What township and range?

A. I run a fence on the, on the east side of Section 5, east and west, and then Cormier took a fence from the—from there where I left off and built a fence between 32 and 33, and I went up half a mile between 28 and 29, and back over to the center of 29 and north again to the line fence. At the time they built that east fence between 32 and 33, they also built a fence clear around that section, and that is Section 32, but left my—I have got a quarter, practically the North Half of Section 33, they left that out in there, and it still is in there, they are using that now, that is part of my—that is my lease, but it has been there and they have been using it ever since.

Q. In other words, that piece of ground is in the same position as that land in Section 31, is that right?

A. There is more of it and better grass.

Q. Are you familiar with the fence quarters in this area? A. Sir?

Q. Are you familiar with the section corners and the [192] quarter corners in this area, have you been in this area before? A. I have.

(Testimony of R. B. Fraser.)

Q. Have you had occasion to locate any of these corners?

A. I tried to, I didn't have any success and I have got Lillis, the engineer, and he worked out there several days to get a line through, he was unable to find corners that were correct, and in fact after he laid the line through——

Mr. Galles: Object to that as hearsay.

The Court: Objection sustained.

A. I was with him, sir.

Mr. Galles: Your Honor, rather than take the time to have the fences described in Unit 19, we will agree that there are fences on certain parts of it, that the fencing does not prevent cattle from going to one part and another, and getting on other land in the area, that it is similar to that of 22, about which Mr. Fraser testified, if that is agreeable to Mr. Jones.

Mr. Jones: Yes.

Mr. Galles: And cattle can go back and forth without restriction in certain parts of the unit because of lack of fencing, and in other parts there is some fencing. [193]

The Court: That is agreeable, Mr. Jones?

Mr. Jones: That is agreeable with me, your Honor.

Q. I hand you Plaintiff's Exhibit No. 3, which covers land in Township 1 South, Range 27 East, and ask you if that instrument, with its legend, that legend portrays the ownership and the leases and holder of permits in this area in 19, since 1954?

(Testimony of R. B. Fraser.)

A. Well, it is, part of it, right, I don't know just how, I don't know whether this means up here, what is the effect of it, I had a competent lease on it.

Q. In other words, you had a competent lease on this yellow area circled with a "C" enclosed?

A. That is right.

Q. And that portrays where your leased land was located, is that correct? A. Yes.

Q. And then that—that is green——

A. The green land is deeded land.

Q. And that is allotment 1452, and 1322?

A. Yes, sir.

Q. And before you owned it, obtained a deed from it, did you have it leased? A. Yes, sir.

Q. And how about Unit 3430?

A. Same way with 3430, we had a lease on it and then bought it. [194]

Q. And Unit 1808? A. Same way, sir.

Q. And Unit 2177?

A. Same way, it is deeded, but it was leased before it was deeded, there is some other land down below here and I had leased along with this unit, and went on down to 227, but I guess——

Q. Will you describe where the water holes are located in, reservoirs and water holes are located in this, on this plat with which involve Unit 19?

A. Yes, Section 23, which is right north of the present Unit 19, has a big water hole and also has a windmill and pump, and a spring, right along the road as you go out on the Hardin road, that windmill and spring is just above, the windmill and

(Testimony of R. B. Fraser.)

the dam is just a little below the windmill, and then on the other side of Unit 19, and Section 34, there is a good sized dam there, and some springs, and, or in the south part of 34, and then there is also water usually from an irrigation ditch running through the East Half of the East Half of Section 35, which also adjoins Unit 19, cattle water a good deal at that irrigation as it runs practically the year around and the cattle—and east and south and north parts there, come there, and the ones on the east side come to the big dam and that is on the south end of the—or the south of the unit. [195]

Q. Is there any watering places located on Unit 19, as it now exists?

A. There is a small dam or mud hole, sometimes when it rains real hard there will be water in it a few days, but that is the only place, and that is in the Northeast Corner of Section 22, and it would be necessary for cattle to go pretty near three miles to get to it from the east end of the unit, of 19.

Q. Where is the nearest water hole that the Cormiers' cattle can go to obtain water without, outside of your land, where would they have to go to get water? A. There isn't any.

Q. Mr. Fraser, do you recall Mr. Powers' testimony in reference to over stocking range Unit No. 19 on November 4th, 1954, in reference to some horses being on this, within this unit?

A. Yes, sir.

Q. Do you know whose horses these were?

A. Frankly, very little territory or leases that

(Testimony of R. B. Fraser.)

I have on the reservation, that isn't filled with horses one time or another belonging to the Indians, and there is no way that I know of to keep them out, and I think most of these were Indian horses that were mentioned by, they might have been two or three saddle horses or something like that belonging to me, but practically all is outside horses.

Q. How long have you lived on the reservation or leased land on the reservation, Mr. Fraser? [196]

A. Since '34.

Q. And since that time you are well acquainted with the practice as to grazing horses on the reservation are you? A. Yes, sir.

Q. Will you tell us what that practice has been, both as to Indians and whites?

Mr. Galles: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Well, we have all got to get along with the Indians who are, after all, own the land. We are all forced to graze their horses more or less, they have lots of horses and they don't use them very much, and they let them run where they will find good grazing. I have been, I have pastured hundreds of horses since I have been on the reservation and I haven't made any big holler about it. As a matter of fact, the Carbon County units last fall rounded up a bunch of Indian horses and tried to get them to take them, so it isn't just one lessee, it is all of us are under the same problem with horses.

Q. Mr. Fraser, do you recall the—the statement

(Testimony of R. B. Fraser.)

of Mr. Powers with reference to over stocking Range Unit 19 on November 4th, 1954, with reference to 196 cattle and 95 calves, being found within this unit?

A. I remember hearing him, yes. [197]

Q. And do you know whether or not this was the number of cattle in there?

A. Well, this is a distribution center for me, I have had thousands of acres besides this, we run on, and we have corrals there and it is close to town where we ship them, and when we brand, we have to have a place where we can round up and brand them, take them out to different pastures and the same way when we feed them in the fall or send them to market, I have run quite a lot of cattle in the beet fields down at Hysham, and I bring them into this, brought them into this territory because I have a good set of corrals and good buildings, or good facilities to take care of them, and it isn't so far to haul the horses, it is on a hard road. I mean haul the cattle, we can take our trucks and haul them where they go, so in the fall every year, like every other lessee on the reservation, I congregate my stuff at shipping time. It is pretty hard for me to tell just how many, because we don't keep track, we kept bunching them in and shipping them out as fast as we can figure out where they go to market, or beet tops or go back to the fields after taking the calves off of them.

Q. Are these cattle in there during all of the whole year of 1954? A. No, sir. [198]

(Testimony of R. B. Fraser.)

Q. I call your attention to the testimony of Mr. Clark C. Stanton, in reference to over stocking of this Unit 19, on the 24th day of May, 1954, and in which we stated, he counted 182 head of cattle and 32 horses within this unit. Do you know who those horses, 32 horses, belonged to?

A. I don't, but I would say probably most of them belonged to the Indians, in May is the time of year when we brand and get our cattle together to cut out bunches to take to the different pastures with bulls, and a little later on we have to get them a bunch at one place where we can brand them, so in May and June we are generally, have to congregate to brand, and as I say, in November, why that is the time we get them to go to ship them, and get rid of them, this has been my gathering spot, and it hasn't been unusual, I have been on the reservation since '34, and there is Speer siding and Aberdeen siding and Benteen siding, all these shipping places down on the reservation here, and everybody ships out of them, and I don't never heard of any of them being penalized because people ship out of any certain spots. Mr. Snyder was a big sheep man when I first came here——

Mr. Galles: Object to this as not being responsive to the question and immaterial.

The Court: Objection sustained. [199]

Q. Now, in reference to these 182 cattle that Mr. Stanton alleged were located in this unit on the 24th day of May, 1954, do you know whether or

(Testimony of R. B. Fraser.)

not those cattle were left on there all year, or when they were on, and when they were put in there, and when they were taken off?

A. They never took us a month to get them, to get the majority of them branded and sent away. They would always be a few stragglers left to take out, to send to different places that we didn't get them all out right away, but I never run the year around, it was one continuous grazing, part of my practice is to run part of the year there as far as the—to gather them, that was my main use of this particular land.

Q. Wasn't there times during the year that you had, you didn't have any cattle in this unit, Mr. Fraser?

A. Many times, very seldom had any there in the winter time, from January 1st on.

Q. Mr. Fraser, you recall the testimony here in reference to alleged violations by you after, from and after December 24th, 1955, of 59 cattle in Unit No. 19, allegedly found in the Northeast Quarter of the Northeast Quarter of Section 35, and the Southeast Quarter of the Northeast Quarter of Section 26, and the Northwest Quarter of the Northwest Quarter of Section 26, and the South Half of the Southeast Quarter [200] of Section 27; do you know whether or not these were your cattle found in that area?

A. It is about the time of the year where possibly we kept a rider with them as much as possible, seeing they didn't do any fencing, and it

(Testimony of R. B. Fraser.)

is possible that that is right, adjoining this deeded land and leased land of mine, and it is possible some of them got over on the Unit 19. They wouldn't stay there because there is no water there.

Q. What have you done since the issuing of the restraining order heretofore made, in attempting to keep your cattle on your own land, if any?

A. I built a fence in Section 35, on the south and west side of the Northeast Quarter of the Northeast Quarter, and from that point, went a mile west between Section 26 and Section 35, and since that time I put an electric fence that was a good, four-wire fence, and at that time I put electric fence the rest of the way down, bordering my, on the north, from, went down to the north side of 34, until my land went north again, and then went north to the rims, with the electric fence, to keep my cattle from getting on Unit 19, and took everything away from the other side that was over by the windmill, and dam and spring over there, we took everything out of that side, haven't had anything in there all spring.

Q. I call your attention to the alleged trespass on [201] March 27th, 1957, of 358 head of cattle, will you state what took place at that time?

A. Yes, the men went out to the range, I was over in, I can tell you exactly, the range we have in 3 and 4, 26, and roundup the cattle that were in there, and went as near as possible in a line to get to my ranges and corrals down in 4, 26. I have got some other land and gathering places in Section

(Testimony of R. B. Fraser.)

22 of 4, 26, they went through, that's about—oh, it is probably two or three or three miles from the edge of my range to the north of this, and my instructions were not to damage any grain or damage anything and be sure they went without causing any trouble in there.

Q. Do you know the condition of the permitted land in Range Unit 19, at the time your permit was cancelled? A. Yes, sir.

Q. What was that condition? A. Good.

Q. Was the condition any different than it was when you took over the unit?

A. It was better, when I took it over, there had been a sheep man ahead of me.

Q. Do you know where these cattle that were allegedly trespassing on January 30th, 1952, in Sections 3 and 4 in Township 4 South, of Range 26, do you know where [202] they were, what area they were turned into?

A. They were; yes, sir, I do.

Q. Where were they?

A. They were turned into 4, 26, into section, north of the nort part of Section 7 and 6, and then the East Half of the Northwest Quarter of Section 6, there was a gate there, they were probably turned into that gate because that is the nearest to my other land, and they were taken up there from.

Q. And whose land is that, was that at that time? A. That was my leased land.

Mr. Jones: You may examine.

(Testimony of R. B. Fraser.)

Cross-Examination

By Mr. Galles:

Q. Mr. Fraser, you said you dealt your sheep to a man by the name of Jaffreys for his ranch?

A. I said I dealt with him.

Q. You dealt with him? A. Yes.

Q. Did you transfer your sheep to him and did he transfer his land to you?

A. It was a trade between us, yes.

Q. With title passing?

A. Well, I don't know whether we both got them at the same time or not, but it gradually ended up with everything passing, it was several years after the trade was made, we finally ended the deal, but it was a [203] deal between us for quite a few years.

Q. And what you say, is that he ended up with the sheep and you ended up with the ranch?

A. That is right.

Q. Did you get title to that ranch?

A. Yes, sir.

Q. Is that recorded over here in Yellowstone County, that transfer from Jaffreys to you?

A. I don't know.

Q. Well, did you get a deed?

A. Well, I sold it to another man, so I got the deed to it all right.

Q. You got a deed from Jaffreys to the Jaffrey land and then you sold it to another man?

A. That is right.

Q. Who is the other man?

(Testimony of R. B. Fraser.)

A. A fellow by the name of Plowman.

Q. And then did you execute a deed to Plowman? A. Yes, sir.

Q. When was that?

A. I think that was sold on a contract, I can't tell you, I can't go back, I haven't got my records with me, it is done through the office of course.

Q. You do have records of that in your office?

A. We do have records of it, and Plowman now owns it, he finally, it was on a contract to start with, but he paid up and got possession now. [204]

Q. Where is Mr. Plowman, does he live out in that area now?

A. I don't know, I haven't seen him for several years, I don't know where he is.

Q. Well do you know whether he still owns it or not?

A. I haven't checked the records, I don't know, I haven't any, any curiosity.

Q. Do you have a copy of that contract for deed that you entered into with Jaffreys?

A. I don't know.

Q. You said you had some records?

A. Well, I said I know I can find out what the records, how we dealt, but I don't know if I got a copy of it or not, because Jaffreys, after we got all settled up, and that's all there is to it, I don't know whether we kept them records after that or not, but if you want to check it, you can find I sold it to Plowman, I think those would be late enough so you could find them.

(Testimony of R. B. Fraser.)

Q. Where would that be?

A. Well, I imagine that would be in the courthouse, it would show a deed from me to Plowman.

Q. Well, where is Mr. Jaffreys now?

A. I don't know, he died quite a few years ago.

Q. He died? A. Yes.

Q. Was he married? A. Yes. [205]

Q. Where is Mrs. Jaffreys?

A. I don't know, Mr. Jaffreys always done his own business and made a trip with me to Canada, and he was a very close friend of mine at the time.

Q. What records do you have of that transaction at your office?

A. I don't know whether I have any or not, because that has been a lot of years ago, and I have moved since then, we had to destroy a lot of records when I moved from, at that time I guess I was on First Avenue down about 32nd, and I moved to this other smaller place here, and I had to clean up what I didn't have, and now I am in another garage, so these records multiply, I don't suppose we keep things that aren't don't have to be kept for Uncle Sam or somebody.

Q. Do you know when you sold the place to Plowman? A. No.

Q. Well, can you estimate?

A. I don't know, I suppose you can find it on the records if you want to know, if it is important, you can find it in the courthouse.

Q. Well, Mr. Fraser, you were the one that said you traded the sheep to Jaffreys, and what I am

(Testimony of R. B. Fraser.)

trying to find out is when you did that, and the records should show, you should have some records to show it, and [206] that is what we would like to see, now do you think you have some records?

A. I made the—I didn't buy any sheep until I was mixed up with Jaffreys, in the deal frankly, because I didn't know anything about sheep, and he took them over on a deal to start with, that is how I happened to buy the sheep to start with, now I don't know what year it was, I can't tell you the year that it was.

Q. Well, you said it was the early part of the 40's?

A. I thought, I would say it was in the early 40's.

Q. Well now, when you bought the sheep, were they assessed for tax purposes in Yellowstone County or Big Horn County?

A. I don't know, I can't tell you that, but I don't think it is in Yellowstone County because I don't think Jaffrey's place is in Yellowstone, I don't believe.

Q. Who was your bookkeeper at the time you operated this ranch with sheep in the early 40's?

A. Well, I have got the same bookkeeper I have had for a long time.

Q. And did you account for the sheep through the books of your business?

A. I don't know, I can't tell you, my main bookkeeper is in California now, I have got a work girl for me down there, but the main bookkeeper is the

(Testimony of R. B. Fraser.)

controller for Townsend and Company in San Diego, and he could probably tell you where it is, but I didn't think it [207] was necessary, so I have not checked or tried to check up on it at all.

Q. Well, when you say that you didn't buy sheep until you met Jaffreys, is that what you said?

A. That is right.

Q. Well, were you in partnership with Jaffreys on the sheep?

A. He was going to run the sheep for me when I got them, that is what caused me to buy them, that I had somebody to look after them.

Q. So that is the arrangement you had, it was sort of an operating agreement, you bought the sheep and he ran them?

A. And then ended up with him taking the sheep and me taking his place, I know he was mixed up in a farm there too, he had some leases on some Indian land that he turned over to me.

Q. Was it an even trade, the sheep for the Jaffrey's ranch?

A. Well, I told you I don't keep books in my head, sir.

Q. Well, do you have some records some place that would show whether you received some money or paid him some additional money?

A. I don't know what records are left of it, because that happened a long time ago, whether we still have them or not, I already said I don't remember, I don't know if he, or if we, got them or [208] not.

(Testimony of R. B. Fraser.)

Q. Can you go look and find out if you have any of them?

A. I could look, nothing to keep me from that, but that isn't the problem to do overnight, we have a lot of records down there, and to try to go through these records to find something——

Q. How long would it take you to do that?

A. I wouldn't want to say, I don't know, I don't know personally where they are.

Mr. Galles: Your Honor, it would seem to me that this is important enough that this witness should be required to find what records he has if there is some question about whether he had title to the sheep on the 31st day of December, 1943. Now I don't want to delay the trial for the purpose of his going down at this time to look, and I don't know what to suggest to the court or counsel, but I believe it is material.

The Court: Of course, it goes primarily to the weight of the evidence I would think. Mr. Jones, do you desire to make any check of the records?

Mr. Jones: Well, what did you say, your Honor?

The Court: I was checking with you to see if you desired to check the records and present any further proof, I think this is [209] primarily a question of the weight of the evidence, I don't know if there is any requirement that the court could require anything further.

(Colloquy between court and counsel.)

The Court: I think it might be well to proceed,

(Testimony of R. B. Fraser.)

and the court will defer ruling on request until after it is determined whether Mrs. Jaffreys will be here.

Q. I believe that you stated Mr. Westburg did work for you at one period of time in connection with your sheep, is that right?

A. He was a sheepherder and was herding sheep when I bought them, and he came with the sheep.

Q. Who did you buy the sheep from?

A. I didn't buy them from Westburg.

Q. No, I asked you who you bought them from?

A. O'Brien.

Q. Where? A. In Judith Basin County.

Q. And then the sheep were shipped down to this area? A. Yes.

Q. To the Crow area? A. That is right.

Q. And Mr. Westburg did work for you though after you acquired those sheep? [210]

A. He looked after the sheep awhile.

Q. And you paid him?

A. The sheepherder I don't know, how we paid him on the thing, but I imagine he got his money.

Q. Well, you mean you don't recall whether you employed him and paid him or not?

A. I imagine we had a sheepherder working for us, I don't know whether, just how long he worked or what other sheepherder worked, or not, but you have got to have sheepherders with sheep.

Q. And you don't remember whether it was Westburg, or do you remember that you did hire, have Westburg herd sheep for you?

(Testimony of R. B. Fraser.)

A. I say he come down with the sheep, I don't know how long he stayed with me, I can't say as to that.

Q. Well, can you answer this yes or no, did Mr. Westburg work for you herding sheep in the early 40's?

A. Well, when he came down with the sheep, he was working for me because I bought the sheep to start with, and then I don't know how Jaffrey and I figured it out, because Jaffrey was looking after them and telling him what to do, and just how the payment was made, whether it was made through us and charged to Jaffrey or how it was done, I don't know.

Q. Well, did you own the sheep or did you and Jaffreys together own them?

A. I bought them to start with and I made a deal with [211] Jaffreys on the thing on the sheep.

Q. Yes, and that deal was what?

A. He was, went in on the sheep deal and I went in on the, took his ranch from him, that was the size of it, and afterwards the ranch was sold to Plowman.

Q. Well now, before you took over Jaffrey's ranch, did Jaffreys have anything to do with the sheep?

A. When do you think I took over the ranch?

Q. That is what I am asking you?

A. Well, I told you in the early 40's, and he was with me on the sheep until the time I got them

(Testimony of R. B. Fraser.)

at the time, that is the reason I got them, because he went in on the sheep.

Q. You mean as soon as you got the sheep, you made the deal with Jaffreys as to his ranch?

A. I can't go back and tell you which is first, I got acquainted with Jaffreys, and he knew all about sheep and he wanted to run sheep, and so I traded these sheep in order to make a deal with him on the ranch, frankly, I don't know, it has been a long time, and a lot of water run under the bridge since then, and I have had a lot of business and I can't quote out of my head and turn it on about one day or week or anything, my memory isn't that good.

Q. I believe you stated you don't know during what period Westburg worked for you, isn't that right? [212]

A. I said I don't know how long he worked, how long before Jaffreys took over, I don't know just how long, no.

Q. You don't know when Westburg started to work for you, and you don't know when he quit working for you?

A. I can't tell you when I bought the sheep.

Q. I can understand why you wouldn't remember, but I want you to answer my question, if you will please, do you remember when Westburg started to work for you?

A. What do you mean?

Q. Do you remember the date that Westburg started to work for you?

(Testimony of R. B. Fraser.)

A. No, because that is when I bought the sheep I told you, I can't remember just when I bought the sheep.

Q. That is final, I want you to, all I want you to do is answer the question I ask, Mr. Fraser, and I am not trying to trick you into anything. Now, I want to know if you know when Westburg last worked for you, the date?

A. I have already, if you will go back a little, you will find that I remember this, that I told you once I didn't remember.

Q. All right, well I want a simple yes or no, without a speech connected with it if possible?

A. All right, I have told you.

Q. Then you don't know whether Westburg was working for [213] you on December 31st, 1943, or not, do you? A. He was not.

Q. How do you know that?

A. Because Jaffreys was handling the sheep.

Q. How do you know he was?

A. This man, Westburg, advised you that Jaffrey was looking after the sheep.

Q. Well, that is what you say, he wasn't working for you because Jaffrey said——

A. Jaffreys was looking after the sheep——

Q. And that is the only reason you say he wasn't working for you, Westburg himself said that on the stand, is that correct?

A. I am not going, I am not going to tell you what I don't know, what I can't remember.

Q. Well that is what I am trying to find out, is

(Testimony of R. B. Fraser.)

when you said, Westburg was not working for you on December 31st, 1943; I wondered if you remembered or whether you were saying it because Westburg said it?

A. It doesn't make any difference to me, because the sheep weren't trespassing anyhow, I have talked to Robert Yellowtail and told him about these, Crawford and I changing grass, and so they didn't do anything about the sheep at the time, and he decided it was all right, because we made a deal to do that, and——

Q. As I understand—— [214]

A. (Continuing): For your information, also, the other outfit that had that other lease that they talked about, I can't remember the other county up there, they had some of my leases in their range, and we traded grass also, so there wasn't any, there wasn't any complaint from them.

Q. Do you recall the testimony of Clem Cormier about his finding 821 sheep on some land on or about June 12th, 1945, branded with the Circle F, do you recall Clem testifying to that?

A. No, I don't know as I did, I will have to look here.

Q. Well, I can tell you, I believe that Mr. Cormier did testify when he was on the stand he observed in Sections 12 and 13, Township 4 South, Range 25 East, about 821 head of cattle with the brand Circle F? A. Sheep, you mean?

Q. Sheep, yes.

(Testimony of R. B. Fraser.)

A. That is the land I tell you that was in Crawfords.

Q. All right now, do you recall having gone to the Indian office, I mean the Bureau of Indian Affiairs when it was up in this building, and paying some eight hundred and odd dollars, some eight hundred odd dollars as a result of the demand for penalty, based on this count?

A. No, I don't.

Q. You don't recall? A. No sir. [215]

Q. I believe you said in your testimony some place along the line that there were many Cormiers' cattle that had grazed back and forth from his land to your land just as yours grazed back and forth from your land to their land, is that, does that fairly summarize what you said?

A. That is right.

Q. Did you ever complain to anyone about the Cormier cattle being on your land when you found them grazing on your land?

A. I didn't get much satisfaction.

Q. I asked you if you complained?

A. Yes.

Q. To whom did you complain?

A. I complained to the gentleman that done the testifying, Mr. Powers.

Q. Mr. Powers, when was that?

A. I imagine about the same time, because he told me that he would get Cormiers together with me, if I would, if I would joint with them and try

(Testimony of R. B. Fraser.)

to block the land out, and I told him I would go anytime.

Q. But that wouldn't have to be a matter of agreement between you and the Cormiers?

A. He said he would try to get them together and work it out, they were using some 3,000 acres of mine over in 3, 28, for five years, I didn't get [216] any trespassing on them, in 3, five years, and no one used it but them. I have got a fence on it now, and when I went over to fence it, I even found they had their cattle on it.

Q. Did you complain about that?

A. I didn't get any, nobody over trespassed anything from me.

Q. Well, did you make a formal complaint to the Agency office at Crow Agency?

A. I haven't gone and looked you up and got you to write out any what you call—all I have told Powers the trouble I have had, and he agreed that he would try to get Cormiers together with me and block it out, block out our land.

Q. Did you ever call Mr. Powers and tell him, could you come out here, now you can count some of Cormiers' cattle on my land, did you ever, were you ever that specific about your complaints?

A. I was given to understand frankly——

Q. No, could you answer that yes or no?

A. I can't remember whether I ever called him up. I have talked to him a number of times about it.

Q. Now with reference to the over-stocking tes-

(Testimony of R. B. Fraser.)

timony of Mr. Powers, with reference to November 4th, 1954, and Mr. Stanton on May 24th, of 1954, I believe you explained why you had an excess number of cattle at that time; did you hear Mr. Powers' testimony under [217] cross-examination by your counsel, that on July 26th, he had reported to him that there was 183 head of cattle grazing on the land permitted to you; now, do you recall his testifying to that, I think he said Mr. Pilgeram——

A. I think he testified from a letter or something, and probably to the best I can say as to that, that has been our distribution point, and they could have been stuff in there for a day or two while it is being distributed and sent out to different places.

Q. But at least you heard him testify that there were substantially the same number of cattle in there on May and July, and Mr. Stanton said about the same number in on November?

A. Well, they weren't the same number of cattle, they weren't the same cattle even, because we never left them in there, but that was a distribution point for me and I had thousands of acres of land besides, so my lease, I had lease enough to cover everything, in fact of matter is, I had never used all the grass that I have out there, a single year yet. Even last year I had this range in 3, 28, and never had a head on it.

Q. Referring to Plaintiff's Exhibit No. 9, that is your signature, is it not, on the back of the first page of the document, called 'Grazing Permit'?

A. It looks like it. [218]

(Testimony of R. B. Fraser.)

Q. Well, do you want to look closely?

A. I'd say it looks like it.

Q. Well, do you recall signing this in 1950?

A. I imagine I did, it looks like my signature.

Q. And, likewise, the additional stipulations, is that your signature? A. That looks like it.

Q. And on the cash penal bond?

A. It looks like my signature.

Q. And, again, on the document called 'Power of Attorney' is that your signature?

A. It looks like it.

Q. And on the 'Modification of Grazing Permit'? A. Yes.

Q. These documents comprise the contract under which you grazed and stocked cattle during 1954, in particular, about which we have been testifying, about which you have heard evidence on May, July and November over-stockings, this is the document under which you had authority to have cattle on that land, is that correct?

A. Well, I don't understand it a little bit, maybe you can explain it to me, now——

Q. You mean you don't understand my question?

A. I don't understand this, I have deeded land, that is in what you call the same permit?

Q. Yes. [219]

A. How can you permit my deeded land, tell me what I have got to have on there?

Q. Well, that is the matter of law, the court will interpret that, all I want to get from you is that this is the agreement that you had on which you ran

(Testimony of R. B. Fraser.)
cattle on Unit 19, in 19, from 1952—until it was cancelled?

A. I haven't read it, but I imagine it looks like my signature.

Mr. Galles: That is all.

Mr. Jones: That is all.

(There being no further questions, the witness was excused.)

(Whereupon a short recess was here taken; court resumed pursuant to recess.)

ROBERT YELLOWTAIL

called as witness on behalf of the defendant, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Jones:

Q. How old are you, Mr. Yellowtail?

A. I will be 68 August the 4th.

Q. And how long have you lived on the Crow Reservation?

All that time, with the exception of eight to ten years in California, while I was at school.

Q. You were born and raised——

A. Oh yes.

Q. On the reservation? A. (No reply.)

Q. What is your present occupation?

A. I am a farmer and rancher.

Q. Do you run cattle on the reservation at the present time? A. Yes.

(Testimony of Robert Yellowtail.)

Q. How many cattle are you running on the reservation?

A. With my family, we have probably 600 head of cows and calves, and close to 100 head of quarter horses, mares and colts, and——

Q. And how long have you run livestock on the reservation?

A. All during my adult life, and from the time I was about 20 years old I presume.

Q. In other words, you have spent your entire life as a cattleman, is that correct? [221]

A. Yes.

Q. And raising cattle on the reservation?

A. Yes.

Q. And you have lived on this reservation for 68 years, is that right?

A. Eight years, or six years, after it was created.

Q. Were you the Superintendent of the Crow Reservation at one time?

A. Yes, from August 1st, 1934, to April 1st, 1945.

Q. And during that time you were also involved in the leasing operations on the reservation, is that correct?

A. Yes, as Superintendent I had charge of that, direct charge, subject of course to the superior offices at Washington and the regional office here.

Q. Are you acquainted with the conservation practices on the reservation at this time?

A. Yes, I saw that thing bud out and grow out, and up to what it is today.

(Testimony of Robert Yellowtail.)

Q. And will you tell this court from your observation what you have observed as to the grazing and conservation of the range on the Crow Reservation from the time you can remember?

Mr. Galles: Object to it as being immaterial, I don't see the purpose.

(Argument to the court by counsel.) [222]

Mr. Jones: In any event, we would object on the further ground that no foundation has been laid.

The Court: Well now, it is the court's recollection that Mr. Powers testified and answered substantially the same question with respect to the conservation practices.

Mr. Jones: That is right.

Mr. Galles: Yes, I believe that is correct.

The Court: I think I will let the witness answer, and the objection is overruled.

A. Mr. Powers testified, when he was on the stand, as has just been recited, as an expert from the University of Montana, on range conservation and practices; those things were unknown, Mr. United States Attorney, when I was a boy. I remember very distinctly back to President McKinley's time, on up, and as I stated a while ago, there was absolutely no, no control in Indian Affairs, administration of range practices control. To substantiate that statement, I point you to Charlie Bear, the biggest sheepman in Montana; Charlie Bear's sheep roamed over this same area that you

(Testimony of Robert Yellowtail.)

are talking about, with no control, no stipulation, no range control, no practices of any kind. The Ray Brothers' sheep [223] up there were on this Northern end as a sheep company; the Oliver Eber Sheep Company, the Lee Simonson Sheep, the 7 Bar 7, Paul McCormick's cattle were in grazing on this area with no range control, and when Mr. Powers testified here as an expert from the Montana University Conservation School, up here, that those rangers, that kind of action is permanent, it injured the range, we have only to go back just a few years when I took charge at Crow Agency in August 1, 1934—when I took charge, I found some of the range in very very bad condition, none of these men, they all worked—these men testifying, with the exception of Mr. Field and Mr. Carter, as Superintendent there—I just want for an example up here so the court will understand, he is of the agency, to the Cheyenne Reservation line, it was under permit or lease, as I recall it now, to Mary B. Morgan, of Sheridan. You will all recall that in 1934 there was a drought in Montana, one of the worst droughts that we have ever witnessed yet. That range was in horrible condition. If leases were up shortly after I was appointed Superintendent, instead of hiring an auctioneer to sell the lands, I and Mr. Nice, the predecessor of Tom Carter, that sits back here, jointly with Mr. Smith, my Chief Clerk then, made the sales. I cried the sales as the auctioneer. [224] I sold a lot of the leases up there for five-year term. When I came to, when I

(Testimony of Robert Yellowtail.)

came to this particular tract, the Mary Morgan tracts of the agency, I just can't recall the unit, but these boys that is sitting back here that worked for me then, can tell the court if you want the unit number, was practically dust, it was a dust bowl; when I cried the sale and tried to sell that particular tract to the prospective bidders that were present, nobody, nobody would look at me in the face when I would point my finger asking various ones, Harvey Cort, Wilkin, everybody down the line, Tschirgi, nobody was interested, because they said the range was ruined. Well the sale was concluded, your Honor, nobody bidding on that, so I went into hauddle with my associate officer, Mr. Capt. George Nice, who was the Regional Officer here in Billings. I said to Mr. Nice, "What shall we do?" "Well," he said, "Bob, you are the Superintendent, you are furnishing the bond to run the Crow Reservation, it is up to you to find somebody that will take this over." A lot of Indians were there without any money. You have what looks like a ruined tract of land, and I said, "I will agree with you." So I called in Harvey Cort from Big Timber, and I said, "Mr. Cort, will you accept this Mary B. Morgan Unit at ten [225] cents, as I recall, ten or eight cents" and he said, "What do you expect me to do with it?" And I said, "Take it, because you are one of our patrons," I am trying to give you a history so it will answer the argument up here, if you don't want me to——

The Court: Cut it down as much as——

(Testimony of Robert Yellowtail.)

A. (Continuing): ——I am just about to the end of it.

Q. I would like to have you confine your statements to what you know, rather than what——

A. (Interrupting): ——This is what I know, because I was a directing officer, representing the Government in the sale and use of that particular unit and the rest of the units on the Crow Reservation.

Q. If you would eliminate what anybody else told you, it is hearsay.

The Court: That is correct.

A. That will be all right, I understand, so after my plea with Mr. Cort, Mr. Cort said, "All right, I will accept." Of course it is pretty hard to get a buy from it, at least, I will say this, I succeeded in selling that Mary B. Morgan Unit that everybody condemned as dust bowl, useless to Mr. Cort, for the advertised price. Mr. Cort did not use that range the summer of 1934, as I recall it, and he let it go because it was declared a ruined piece of ground and Washington was so advised, and Mr. Nice joined in with me, that it was in bad shape. That [226] particular unit went that summer without any use. That fall we had some rains, the next spring we had a good average season range, that unit came back and Mr. Cort turned his sheep on that that next summer, and has been using it ever since, and today you would never know that range was at one time a dust bowl. So we have, your Honor, we have grass in this Southern Montana

(Testimony of Robert Yellowtail.)

country on the Crow Reservation that has the ability to come back, after terrific use and abuse. The buffalo in the old days had come by the billions from Canada on down, proves that statement. The continued use by various stockmen from the creation of the Crow Reservation, not the creation, but the designation of this part up here as part of the Crow lands in 1880, right after the Custer massacre up there, that Custer war, proves that statement, that successive use without any, but now in '34, Mr. Rhoads and Mr. Scattergoods, as I understand the range stipulations, that you have been talking about here, we entered in a period of control, and then these violations that are now resultant, and we are having actions here in the court to penalize people's use up here is something of very recent, but I merely mention that in answer to the question propounded to me by the attorney here about the abuse. When you come to a stating that these abuses are continuous or permanent, there [227] is no such thing happens. History, history defines that kind of statement, and as he stated to me, he asked me if I was interested in the stock business, and I say yes, only people that have used these ranges over a long period of time as operators can answer that with, can answer that question with some degree of certainty. People that come from the universities, and I don't care where they come from, with theoretical educations from the books, have never had their rump in the saddle or taken the ups and downs of the cow business

(Testimony of Robert Yellowtail.)

from year to year, up there, and are not practical. That has been proven and demonstrated on the Crow Reservation, and regardless of what The Area Office, and its officers there that are smiling in opposition say, their smiles don't make that they say so (witness spitting on the floor).

Q. Mr. Yellowtail, at the time you were Superintendent in the Crow Reservation, what was the policy in reference to adjoining landowner's fencing, if there was such a policy?

Mr. Galles: I will object to that as being immaterial.

The Court: I am going to let him answer under the defense theory, I think it is important and I believe he should be given an opportunity. [228]

A. There is no statute, Congressional action, regulation, or otherwise, that I know of, at least the eleven years that I had charge of Crow Agency, that covers the subject of fencing. That was a matter that was left largely in the hands of the Superintendent under his bond. He, in conjunction, there were no area offices then, Mr. Capt. George Nice, up there, was a regional officer, stayed in this building, to help the Reservation Superintendents in Montana and Wyoming. The question of fencing was a very touchy one; it was an embarrassing one for the administrative officer in charge at Crow Agency. It left him the umpire, it left him the umpire of all these range disputes whenever they came up between a conflicting interest of lessees on the Crow

(Testimony of Park Taylor.)

Q. Now, don't testify as to anything that Dan said, but just whereabouts was it that you had the conversation with Mr. Powers?

A. Well, that was at the gate where we went out of the field.

Q. Do you know what, where that is located as to section and township? A. No, I don't.

Q. When did this take place?

A. Well, it was after we gathered the cattle and started to move them.

Q. What date?

A. Well, I can't remember that, I didn't have the date down.

Q. Do you know about what date it was?

A. I imagine it was in March, I don't remember.

Q. Mr. Taylor, Mr. Powers has testified it was on March 27th, 1957, do you recall whether it was that date or not?

A. That would be correct, I imagine.

Q. Would you repeat, tell us just what the conversation was that you had with Mr.——

A. Well, Mr. Powers was parked just outside the gate, and I rode out and asked him what he wanted, and he said he wanted a count on those cattle, and I [232] said to Mr. Powers, "Are you going, bringing a trespass charge against us"—I said, "If you are, I will take them back up to the corral and haul them. And he said, "No, I am not going to interfere in no way with whatever you are doing, go ahead,"—but he says, "The court advised

(Testimony of Park Taylor.)

me to watch movement on these cattle," and that was—he counted the cattle and I counted them.

Q. How many cattle did you count?

A. I recall my count I think was 358 and he had two or three head more than I did.

Q. Where did you take these cattle?

A. Well, we took them across country down to the ranch on Pryor, it is acrossed grass land all the way, I am not familar with the sections or lots or allotments.

Mr. Jones: You may examine.

Cross-Examination

By Mr. Galles:

Q. Do you know whether you went across land that was not permitted, leased, or owned by Mr. Fraser?

A. No, I don't, I just took the shortest route out there, wherever we figured the cattle would do, not damage, just across the grass, we kept the cattle moving all of the time.

Mr. Galles: That is all.

(There being no further questions, the witness was excused.) [233]

Mr. Jones: Defendant rests, your Honor. [234]

Rebuttal Testimony

THOMAS L. CARTER

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Mr. Carter, your name and where you live?

A. Thomas L. Carter, and I live in Minneapolis, Minnesota.

Q. What do you do there?

A. I am employed with the Bureau of Indian Affairs.

Q. How long have you been employed with the Bureau of Indian Affairs?

A. Continuously since about the middle of 1928.

Q. Did you ever have duty in Billings, Montana, with the Bureau of Indian Affairs?

A. Yes; I did.

Q. For what period?

A. From July, 1941, until June of 1956.

Q. Some fifteen years?

A. That is right.

Q. Were you in court when I asked Mr. R. B. Fraser if he recalled ever having paid eight hundred some odd dollars for sheep trespass penalties?

A. Yes; I was.

Q. Did you ever have any dealings with Mr. Fraser with respect to such a matter?

A. Yes; I did.

(Testimony of Thomas L. Carter.)

Q. When and where was that? [235]

A. Some time in 1945, as I remember, was the—I couldn't give you the exact date, but the place was in my office in this building right around the corner here.

Q. What transpired?

A. The boys at Crow had reported a trespass, a sheep trespass, and brought in affidavits which convinced me that there had been a trespass, and I was also advised by the Superintendent at Crow Agency, who was at that time Mr. Warren O'Hara; that a negotiation was under way whereby the Extension people at Crow Agency were purchasing some cattle from Mr. Fraser for Indian loan clients down on the reservation. We had a conference in my office on a Saturday morning, here in this building, with Mr. Fraser and his attorney, who was at that time Mr. Tom Burke. Mr. Warren O'Hara, the Superintendent at that time, was present, and, I believe, that during the conversation that morning that Joe and Clem Cormier came in. My memory is vague as to just why they were in, but at least they were there. We made arrangements to hold up the payment on the voucher for the cattle being purchased from Mr. Fraser pending settlement of the trespass, and I believe that my memory is correct, and that Mr. Fraser then gave us a check in the amount of $812.00 to cover the trespass on the sheep in order that his voucher could be cleared for payment. We asked him to get that [236] check

(Testimony of Thomas L. Carter.)

certified, which he did, and brought it over and delivered it in my office.

Q. Had a demand been previously been made upon him for that, for that $812.00?

A. Yes; it had.

Q. And did he object to the payment of it for any reason?

A. He objected, yes; he protested the payment of the amount that was requested on the basis that he had other lands on the reservation which he contended should compensate for trespassing on other people's land, where he had no permission to be.

Q. Did he object for the reason that he did not own the sheep? A. No; not at all.

Mr. Galles: You may examine.

Mr. Jones: No examination.

(There being no further questions, the witness was excused.)

(Whereupon, a short recess was here taken; parties present the same as before.) [237]

MRS. MARGARET JAFFREY

called as a witness on behalf of the Plaintiff, in rebuttal, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Galles:

Q. Will you state your name, please?

A. Margaret Jaffrey.

Q. That is spelled J-a-f-f-r-e-y?

(Testimony of Mrs. Margaret Jaffrey.)

A. Yes, sir.

Q. Where do you live?

A. Edgar, Montana.

Q. Was your—are you a widow?

A. Yes, sir.

Q. Was your husband's name James G. Jaffrey?

A. Yes.

Q. Did you and your husband live on the, on or near the Crow Reservation in the Pryor area at any time? A. Well, near the reservation.

Q. Near? A. Yes.

Q. When did you live there?

A. Well, from 1912 until we sold.

Q. And when did you sell?

A. 1942, I believe.

Q. Do you—to whom did you sell?

A. To Mr. Fraser.

Q. That was your ranch property near the reservation in the Pryor area? [238] A. Yes.

Q. How did he pay you for that sale?

A. In cash.

Q. Did Mr. Fraser ever transfer title to the sheep in payment of title to that ranch?

A. No; not that I know of.

Q. Did you ever, you and your husband, ever purchase any sheep from Mr. Fraser at any time while you lived at your place? A. No.

Mr. Galles: You may examine.

(Testimony of Mrs. Margaret Jaffrey.)

Cross-Examination

By Mr. Jones:

Q. Mrs. Jaffrey, did Mr. Jaffrey work with Mr. Fraser in 1943, do you recall?

A. Yes; he tended sheep camp for him.

Q. Do you know whether or not he had any interest in these sheep in 1943?

A. Not that I am aware of.

Q. Do you know what kind of arrangements were involved between Mr. Jaffrey and Mr. Fraser?

A. Well, I don't know.

Q. Did you take part in his business transactions between Mr. Jaffrey and Mr. Fraser?

A. No; I didn't.

Q. Do you know how much Mr. Fraser paid Mr. Jaffrey for the premises? [239]

A. No; I don't.

Q. You don't know how much he paid?

A. No.

Q. Do you know whether or not it was a contract? A. No; I don't.

Q. Do you know whether or not it was on a condeeded to Mr. Fraser or not?

A. I do not know.

Q. Or was it deeded to Mr. Plowman?

A. No; we didn't sell it to Mr. Plowman.

Q. Did you sell any land to Mr. Plowman?

A. No.

Q. Did you, yourself, receive any of the money

(Testimony of Mrs. Margaret Jaffrey.)

for the sale of the place? A. No.

Q. It all went to Mr. Jaffrey? A. Yes.

Q. Were you and Mr. Jaffrey living on the premises at the time Mr. Fraser, Mr. Jaffrey was working these sheep out there? A. Yes, sir.

Q. You were still living on the premises?

A. Yes.

Q. Do you know whether that was before or after you sold your place?

A. That was after we sold.

Q. It was after you sold the place? [240]

A. Yes.

Q. In other words, Mrs. Jaffrey, you don't know, do you know when the place was paid for?

A. I couldn't tell you right now.

Q. You don't know whether it was paid for at the time that you executed the deed, or not?

A. I could not say.

Q. You couldn't say, you don't know, is that right? A. No; I don't know for sure.

Q. Do you know for sure whether or not it was a cash transaction? A. Yes.

Mr. Galles: Was your answer "yes"?

A. Yes.

Q. What do you mean by "cash," what is your understanding of cash transaction?

A. Well, being paid for in cash.

Q. Being paid for, but yet you don't know when it was paid for?

A. Well, I don't know when the last payment was, if that is what you want.

(Testimony of Mrs. Margaret Jaffrey.)

Q. Oh, in other words, it was paid for over a period of years? A. Yes.

Q. Commencing in 1942?

A. If I remember right, yes.

Q. Did you receive any of the payments? [241]

A. No; I did not have nothing to do with them then.

Q. Do you know whether or not the property was contracted? Was it a contract, or was it, did you give them a deed immediately, or do you know?

A. I don't know.

Q. You don't know? A. No.

Q. In other words, you don't know whether it was on a contract or whether there was a deed given before you received payment or not?

A. No; I don't know.

Q. Do you know how the payments were made? Were they made by check, or by cash, or by what?

A. I didn't see any of them. I suppose they were by check.

Q. In other words, Mr. Jaffrey received all of the payments himself? A. Yes, sir.

Q. And were these payments received after you executed the deed or before, do you know?

A. I don't know.

Q. Do you know whether you executed more than one instrument in reference to this transfer of this property, or not? A. No; I don't.

Q. You don't know?

A. (No reply.) [242]

Q. Did you read the contract at the time you

(Testimony of Mrs. Margaret Jaffrey.)

signed it, or the instrument that you signed transferring the property? A. I guess we did.

Q. What is that?

A. I guess we did, I guess.

Q. But you don't recall?

A. I don't recall what the——

Mr. Jones: I believe that is all.

(There being no further questions, the witness was excused.)

Mr. Galles: The Government rests, your Honor.

Mr. Jones: I think, your Honor, that I, myself, would like the opportunity on this matter to check into it. I think that it is still up in the air as far as I am concerned with reference to these sheep.

The Court: You are wondering whether you want to offer surrebuttal?

Mr. Jones: Well, what I am wondering about is trying to check the records to find out just what did take place.

The Court: Well, the court is going to give both sides an opportunity to check the records.

Mr. Jones: I wonder if we could [243] check the records and report in Monday, would that be——

Mr. Galles: I might state the only record we could find from the Jaffreys to anybody for their land in that area was from the Jaffreys to Plowman, and no record of a deed or contract from the Jaffreys to Mr. Fraser. Now, what other records did you have in mind?

Mr. Jones: That is what I had in reference to—I haven't——

Mr. Galles: Well, if you wish to check that, why, that would be fine. It might be that Mr. Fraser would have a contract or some instrument.

The Court: That is something you mentioned before, that Mr. Fraser check his own records to see if he does have a contract, or any other written documents that might have some bearing. Well, if it is agreeable to counsel, we could continue the case for that purpose until 2:00 o'clock Monday afternoon, simply for that purpose; is that agreeable?

Mr. Galles: That's fine.

(Whereupon, court recessed at 4:30 o'clock p.m., until the following [244] Monday at 9:30 o'clock a.m.)

July 8th, 1957—2:00 P.M.

(Court resumed pursuant to recess; parties present the same as before.)

The Court: Is there anything further to present?

Mr. Jones: The only thing we could find in checking Mr. Fraser's records is that a contract with Mr. Plowman; that they referred to as to the property, which I think was already shown by the statements of counsel for the United States, that Fraser, or that the property was deeded to Plowman by the Jaffreys, and the only thing we have in line with that is the contract between Fraser and Plowman as to the agreement, that is all; we don't have anything as to, any written evidence as to

Jaffrey's and Fraser's transaction, so I can't see where it is actually of any relative value.

Mr. Galles: That would be our position, that it is not material and relevant to the issue in this case, although the same thing did come up during the Government's last witness when they stated, [245] that was Mrs. Jaffrey, stated that she sold the land to Mr. Fraser, and he later sold it to Plowman.

The Court: This would tend to confirm——

Mr. Galles: That would confirm that, so I don't think it has anything of value to add.

The Court: That is correct. Then you have nothing further, Mr. Galles?

Mr. Galles: No; we have nothing further.

The Court: Well, pursuant to our understanding last Wednesday, it is ordered that the Plaintiff will have twenty days within which to serve and file a brief, and that the Defendants will have twenty days after receipt of Plaintiff's brief within which to serve and file a brief, and that the Plaintiff will have ten days after receipt of Defendants' brief within which to serve and file reply brief. If nothing further, the court will be in recess.

(Whereupon, said case was then taken under advisement by the court, pending the filing of briefs.) [246]

Certified true and correct record.

/s/ ROBERT T. ROGERS,
Court Reporter.

[Endorsed]: Filed February 12, 1958. [247]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO RECORD ON APPEAL

United States of America,
District of Montana—ss.

I, Dean O. Wood, Clerk of the United States District Court for the District of Montana, do hereby certify that the papers accompanying this certificate, to wit:

Complaint, contained in Judgment Roll.

Amended Answer, contained in Judgment Roll.

Pretrial Order, dated July 2, 1957.

Findings of Fact and Conclusions of Law, contained in Judgment Roll.

Opinion, contained in Judgment Roll.

Judgment, contained in Judgment Roll.

Notice of Appeal by defendants.

Supersedeas Bond on Appeal.

Statement of Points on Appeal, by defendants-appellants.

Motion for Order Extending Time to File and Docket Cause in Appellate Court.

Order Extending Time to File and Docket Record on Appeal.

Designation of Appellants, of contents of record on appeal.

Motion filed May 3, 1956, for Preliminary Injunction.

Order of Court filed May 26, 1956, ruling on motion of defendants, contained in Judgment Roll.

Order of Court filed November 30, 1956, granting preliminary injunction.

Plaintiff's Notice of Appeal.

Plaintiff's Designation of Additional Portions of Content of Record on Appeal.

and the Reporter's Transcript of Testimony are the original files and records in Civil Action No. 1804, United States of America vs. R. B. Fraser, R. B. Fraser, Inc., a corporation; R. B. Fraser, Jr.; Fraser Livestock Company, a corporation, and Charles Fraser, of record in the above-entitled Court, and designated by the parties as the contents of the record on appeal therein.

I further certify that Defendants' Motion for Dismissal at the close of the plaintiff's evidence, designated as item number 5 in Appellants' Designation, is contained in the Reporter's Transcript of Testimony accompanying this certificate.

I further certify that Plaintiff's Exhibits Nos. 1, 2, 3, 5, 6, 7, 8, 9 and 12, accompanying this certificate, and designated by the parties, are the original exhibits introduced in evidence at the trial of the aforesaid case, and are part of the record on appeal therein.

Witness my hand and the seal of said Court at Billings, Montana, this 19th day of February, 1958.

DEAN O. WOOD,
Clerk as Aforesaid;

By /s/ C. G. KEGEL,
Deputy.

[Endorsed]: No. 15917. United States Court of Appeals for the Ninth Circuit. R. B. Fraser, R. B. Fraser, Inc., a Corporation; R. B. Fraser, Jr.; Fraser Livestock Company, a Corporation, and Charles Fraser, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Montana.

Filed: February 24, 1958.

Docketed: March 6, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

No. 15918

In the

United States Court of Appeals

For the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY,
a corporation, *Appellant,*

vs.

JOHN LYLE MONTGOMERY, *Appellee.*

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable GUS J. SOLOMON, *District Judge*

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DAILY JOURNAL OF COMMERCE

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STATUTES AND OTHER AUTHORITIES

No. 15918

In the

United States Court of Appeals

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BANKERS UNION LIFE INSURANCE COMPANY,
a corporation, *Appellant,*

vs.

JOHN LYLE MONTGOMERY, *Appellee.*

APPELLANT'S BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable GUS J. SOLOMON, *District Judge*

JURISDICTION

This action was brought in the Circuit Court of Oregon for Multnomah County by plaintiff-appellee, a citizen of Oregon, against defendant-appellant, a Colorado corporation, seeking to recover death benefits under a policy of insurance issued by appellant on the life of appellee's deceased wife (R 6). Appellant removed the case to the United States District Court

for the District of Oregon under 62 Stat 937 (28 USCA § 1441). The amount in controversy, exclusive of interest and costs, exceeds $3,000 (R 3, 8).

Appellant has appealed from the final judgment of the district court (R 21-22).

The district court acquired jurisdiction under 62 Stat 930 (28 USCA § 1332) and 62 Stat 937 (28 USCA § 4441). This Court acquired jurisdiction under 62 Stat 929 (28 USCA § 1291) and 62 Stat 930 (28 USCA § 1294).

STATEMENT OF THE CASE

Appellee seeks to recover double indemnity death benefits under a policy of life insurance (No. 27244D) issued by appellant October 27, 1954 on the life of his wife, Anna Grace Montgomery, who died January 20, 1956 (Ex 1). Appellee is the beneficiary named in the policy (R 4-14).

On March 12, 1956 appellee submitted proof of death and demanded payment of the policy benefits. Appellant rejected the demand and notified appellee before the complaint was filed that it rescinded the policy and tendered the amount of premiums previously paid with interest. The tender was rejected (R 4-14).

The insured had died within the two year incontestability period provided in the policy (R 223), and

appellant's refusal to recognize the policy was based on certain alleged fraudulent statements contained in the policy application.

The case was submitted to the jury on four sets of special interrogatories, each set relating to a specific question and answer contained in the policy application (R 15-17). With respect to each question and answer, the jury found that the answer contained in the application (a) was material; (b) was relied on by appellant; but (c) was not wilfully false (R 15-17).

Based on the jury's answers to the interrogatories, judgment was entered for appellee for the face amount of the policy, together with an attorney's fee[1] in the amount of $5,000.00 (R 15-18).

Appellant's motion for judgment n.o.v. or, in the alternative, for a new trial (raising errors in the admission and exclusion of evidence) was denied (R 18-21, 209-220), and appellant thereafter filed its notice of appeal (R 21-22).

STATEMENT OF THE EVIDENCE

The policy application admittedly was prepared by the insured and appellee (who is a doctor and the named beneficiary in the policy) and signed and sub-

[1] Under ORS 736.325

mitted to appellant by the insured on October 13, 1954 (R 81-84, 148-149, 159-160, 162, 227).

The following questions and answers were contained in Part 1 of the application (with answers in italics):

"27. Have you had or have you ever been told you have or have you ever been treated for:

. . . (e) Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells?

No"

"28. Name below all causes for which you have consulted a physician or healer in the last ten years; give details: (Include also particulars of any 'Yes' answer to Question 27.)

Disease or Injury (If none, state 'None')	Date	Duration	Complications
Nervousness	*2 yrs. ago*	*about 2 mos.*	*None*
Suspension (Uterus)	*3 yrs.*		*None*

Was Operation Performed	Result	Name and Address of Attending Physician or Healer
	Excellent	*Joseph Cooney*
	Excellent	*Dr. Ira Neher*"

"29. Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not in-

cluded in any of the above answers? (If yes, give full particulars.)?

No."

"33. Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the Company should be advised? (If none, please state 'None.')

None" (R 227)

Question 10 of Part 2 of the application (Declaration to Medical Examiner) and the answer thereto read (in part) as follows:

"... D. Have you ever undergone any surgical operation?

E. Have you consulted or been treated by any physician for any ailment or disease not included in your above answers? (If so, give full details.)

'Yes' or 'No'	Name of Ailment Disease or injury	No. of Attacks
(D) *Yes*	*Suspension (Uterus)*	
(E) *Yes*	*Nervousness*	
~~No~~		

	Date	Duration	RESULTS and, if within five years, name and address of every physician consulted
(D)	*3 yrs. ago (Feb)*		*Excellent Dr. Ira Neher*
(E)	*Before & after above surgery*		*Excellent Dr. Joe Cooney*

(R 230)

It is undisputed that the insured had been a patient in the psychiatric ward of Holladay Park Hospital under the care of Dr. Robert Coen and Dr. Herman Dickel, psychiatrists, on March 7 to 10, 1951 and again on April 9 to 22, 1951, a total of approximately 18 days (R 41-42, 82-83, 87-88, 90).

Her first visit was for a psychiatric examination (R 88). She was taken in an irrational condition (R 67, 73) to the hospital by ambulance and was placed behind locked doors in the psychiatric ward (R 60, 82, 83, 155). She was sent to the hospital on that occasion, and Dr. Coen was called for consultation by her regular doctor, Dr. Joseph Cooney, an internist,

> "because her agitation was to such an extent that he didn't feel, from a medical viewpoint, that it fell within his realm to manage it, and he would like to have consultation." (R 152; see also R 64, 67, 164-165)

During her second visit, "after considerable consultation," she was given five shock treatments (R 88, 92-93). Appellee consented to these shock treatments (R 82-83, 93), which at that time were given to patients presenting any major psychiatric illness or a depression of almost any degree (R 93).

Her diagnosis on each occasion was "schizophrenia, paranoid type" (R 50, 90, 95, Ex 3A), which is a mental illness involving the functions of the nervous system (R 61, 95-96). There was no organic disturbance of the central nervous system (R 94-95).

The condition of paranoid schizophrenia was described by Dr. Dickel as follows:

> ". . . The word actually from a medical point of view, means the condition in which an individual physically may be entirely intact, functioning, living, going about with the rest of us in the same way that the rest of us do, but mentally and emotionally is at that moment not functioning the way that he should. In other words, there is a splitting between the physical aspects of the individual and the emotional or the mental aspects of the individual.
>
> "Perhaps a little example might clarify it for you. Under certain circumstances, a person coming to court, say, on a Monday, getting up in front of a group of attorneys and the jury, would physically and mentally and emotionally show some degree of distress which I am sure I can manifest at the present time. In other words, my mental, my emotional, my physical reactions are all essentially the

same. They are all functioning pretty much in keeping with the situation.

"A schizophrenic individual might physically be here, but mentally, in order to answer the question, might laughingly talk about the Queen of the May or what happened on the Fourth of July in 1854 or might get up and dance around or some such thing like that; a rather obscure example, but I used the obscure one in order to show you that they may physically be in the same world we are, but mentally and emotionally at that time they wouldn't.

"The word 'schizophrenia,' therefore, refers not to a specific disease like pneumonia or chicken pox but rather to the way that the individual is reacting. Unfortunately, nobody at the present time knows what is the cause of schizophrenia. It has been assumed up until the last three or four years that schizophrenia was entirely a disturbance 'from the ears on up,' putting it in ordinary language. In the last three or four years certain very important discoveries have been made. One of these discoveries is that it is possible to take the blood of a schizophrenic patient and inject it into an entirely normal person and produce schizophrenic symptoms so for the first time in the history of medicine we are beginning to doubt that there is such a thing as a mental disease in the sense that it is all in one's imagination. Apparently, it begins to appear that certain physical changes or endocrine or glandular changes in the body at any give (sic) time can produce a disturbance which we could call in psychiatry a schizophrenic reaction so that at the present time in using the word 'schizophrenia' the doctor refers to a particular way a person is reacting.

"Schizophrenia may be a permanent thing, as is evidenced by the number of people who are in the State Hospital over a period of many, many years. Schizophrenic reactions may be temporary,

as little as two or three days, and the reason why some are permanent and some are temporary, again we doctors do not know. If it is proven that it is a chemical sort of problem, then we will know because chemical things can vary.

"The expression 'paranoid' refers to a schizophrenic condition or a schizophrenic reaction in a patient where the individual is blaming other people for the things that are going wrong in him. Now, we are all inclined to do that sort of thing a little bit, and in a schizophrenic patient or a patient with schizophrenia, that blame is to a degree that is serious, serious enough for the doctors to wonder about it, serious enough for the doctors to so label it. Under ordinary circumstances, all schizophrenic people blame others a little bit, but where it is used as a part of the diagnosis it is to a point where it is somewhat more serious, a little more serious than under ordinary circumstances." (R 51-53; see also R 90, 95-96)

Appellee described her symptoms as follows:

"Q. At the time, Doctor, just immediately prior to going to the hospital in March of 1951, could you explain to the Court and jury what her condition was?

A. Well, as I previously stated she would at times become agitated and she was smoking two to three packs of cigarettes a day, and at times she would cry, or I might come home and find her crying and, oh, yes, and at times she felt that her, some of her own relatives had said things in the past that upset her that were not true." (R 151-152)

"Q. Who was it that decided in April — it was just less than a month's time, wasn't it, that Mrs. Montgomery was taken back to Holladay Hospital?

A. Yes.

Q. Would you explain why?

A. Yes, because again she became depressed and agitated and would cry and would smoke cigarettes. She was never an individual to drink heavily, but if we went out socially I don't mean that she would get drunk. She would nervously drink her liquor and be excitable a combination not of drunkenness but a combination of this nervous agitation, smoking cigarettes and putting her drink down and talking in an agitated manner with people and skipping from one subject to another in her discussion. Therefore, I talked it over with her and with Dr. Cooney, and she agreed again that this time to go back to the Holladay Park, and Dr. Cooney referred her there again." (R 153-154)

Her symptoms were further described by Dr. Coen as follows:

"A. She presented three things: One, a looseness of association by which is meant that her ideals (sic) did not hang together;

Second, she presented ideals of references. This term is used to indicate people who feel that events or statements are meant for them; and

Third, she presented delusions of persecution. She felt that others were deliberately causing her trouble." (R 88-89)

Dr. Cooney testified in his deposition that she had been depressed and withdrawn (R 72). She also suffered from delusions of persecution (R 151-152, 165, 166-167) and was emotionally upset (R 72).

Her case was described by Dr. Coen as "early" and "relatively mild in degree" (R 91). Dr. Lee, however, testified that such conditions are always severe (R 117).

Dr. Dickel, who saw the deceased briefly on two occasions in Dr. Coen's absence (R 41, 43) and who actively participated in her treatment (R 89-90) testified that if he, a psychiatrist, were filling out the application, he would describe her condition as nervous prostration rather than mental derangement, because the term "mental derangement" more accurately refers to an organic disease (R 55-58). Dr. Cooney described her condition as a "nervous breakdown" (R 70; see also R 160, 163-164).

Dr. Lee, a member of appellant's board of directors and its principal medical advisor, testified that the company had relied implicitly on the answers contained in the application and that if the true nature of the insured's illness, her psychiatric diagnosis or the names of the treating psychiatrists had been disclosed, the policy would not have been issued (R 100-108, 119, 120-121, 123-124). The designation of "nervousness" in the application (R 227, 230) had meant little, since the company related it to the further reference to sur-

gery (R 114-116, 120). The answers gave no indication whatever that the insured was suffering from a mental illness, and the company had seen no need to make any inquiry of Dr. Cooney regarding Mrs. Montgomery's medical history, because the facts disclosed indicated only that she was an insurable risk (R 115, 120; see also R 78).

Dr. McGee was the medical examiner who filled in Part 2 of Mrs. Montgomery's application, basing his answers upon his examination and statements then made to him by the applicant (R 130-133, 230). Over appellant's objection, he was permitted to testify that he knew she had been in the hospital, although he could not recall when or how he learned of it or whether she told him at the time of the examination (R 133-134, 144-145; see also R 135-137, 139). (See R 133-134, where the question and objection first appear, and R 139, 141-142, 143 where, during an offer of proof, the trial judge changed his original ruling excluding the testimony.)

Appellee admitted on cross examination that he had himself written a large part of the application and had assisted Mrs. Montgomery in preparing it (R 83-84, 159-160, 162, 227). It also appeared that appellee discussed his wife's condition with Dr. Coen (R 83, 157, 168-170) and with Dr. Cooney, in the latter case with specific reference to schizophrenia (R 66, 77-78).

SPECIFICATION OF ERRORS

1. The trial court erred in denying appellant's motion for a directed verdict.

The motion was as follows:

> ". . . defendant moves the Court for an order directing the jury to return its verdict against plaintiff and in favor of defendant on the grounds and for the reason that it affirmatively appears without question that the plaintiff and the deceased, Anna Grace Montgomery, at the time of the application for insurance to the defendant, made answers in the application which were made false, wilfully false, and with regard to the answer requesting the names of doctors who had been consulted for any ailment as set forth in question No. 29, the names of the doctors were not filled in, and even though that may not have been done wilfully, it amounts to legal fraud vitiating the policy." (R 178)

2. The trial court erred in permitting Dr. McGee to testify over the objection of appellant that he knew when Mrs. Montgomery consulted him respecting the medical portion (Part 2) of the policy application that she had been confined in Holladay Park Hospital, although he could not recall whether she spoke to him about it at that time or whether he learned of it at some other time and place.

The initial offer of testimony, appellant's objection thereto and the court's initial ruling were as follows:

"Q. Did you know that Mrs. Montgomery had been confined in the Holladay Park Hospital?

Mr. Gearin: Objected to, your Honor, on the grounds and for the reason that the information he received from outside sources would not be binding upon the company unless it was disclosed at the time of the examination that he made for which he may have been deemed to have been acting in our behalf.

Mr. Davis: I will limit my question, your Honor.

Q. At the time that you examined Mrs. Montgomery for the Bankers Union Life, did you know of the prior condition, Doctor, that is, her nervous condition?

Mr. Gearin: Just a moment, please. We object, your Honor, on the grounds and for the reason that his knowledge at that time may have been acquired from other sources, and I think it should be limited to the information — to his examination that he made at that time, and I further object upon the other ground, that the witness has stated he cannot recall what was said at the time."

The Court: I am going to sustain the objection at this time with permission to make an offer of proof in a few minutes." (R 133-134)

In the course of appellee's offer of proof the following transpired:

"The Court. It seems to me that in view of the witness' statement to the effect that he does not recall exactly whether Mrs. Montgomery told him that she had been to Holladay Park Hospital or whether he knew it from prior contact makes this

testimony admissible on the ground that she may have divulged the information to him and he, in his judgment, elected not to put it down.

I realize that it is highly irregular for a physician to do that, but this man says that is what he did, and I appreciate the fact that it is difficult testimony to meet, but I am going to overrule the objection and permit the witness to testify. . . ." (R 139)

Mr. Gearin: May I ask the nature of the Court's ruling with regard to your statement that you are overruling the objection? May I inquire as to that?

The Court: I told you the reason. The reason why I interrogated this witness further was to determine precisely the basis upon which this testimony may or may not be admissible. It was admissible, in any event, because the witness has stated here that he does not recall exactly what the deceased told him. She may have told him that she had been to Holladay Park Hospital in addition to his own knowledge. If that is true, then the plaintiff has the privilege of bringing that out because his interpretation of the questions would depend upon the information divulged to him at the time. That is the only thing that I have ruled upon that he can bring out that information. . . ." (R 141-142)

Thereafter, the following transpired in the presence of the jury:

"Q. (By Mr. Davis): Dr. McGee, at the time Mrs. Montgomery was out in your office for examination, at that time did you have knowledge

that Mrs. Montgomery had been in the Holladay Park Hospital here in Portland?

A. Yes.

Q. Did you know the names of the doctors that were taking care of her at the Holladay Hospital?

A. No, I didn't.

Q. Do you know that they were doctors there — I mean, let me ask you this question, Dr. McGee. Did you know that Dr. Cooney was not affiliated or attached—

The Court: Well, that is not the question that you indicated you wanted to ask. You wanted to ask, and the question that I sustained an objection to and later set aside my ruling was: Did she divulge to him at the time that she had been to the Holladay Hospital. First, let him answer that question, and then you can proceed with the other line of interrogation.

Mr. Davis: Yes.

The Witness: I don't recall at the time whether that was discussed or not. I did know that she had been to Holladay Hospital, but whether it was discussed, your Honor, at that time or not I don't remember, with Mrs. Montgomery." (R 144-145)

Summary of Argument

I

1. The evidence was conclusive and uncontradicted that the policy application[2] prepared by the insured and appellee and submitted to appellant contained wilfully false statements respecting the medical history of the insured which were material to the risk and were relied on by appellant in issuing the policy.

2. The evidence was conclusive and uncontradicted that the insured and appellee failed to disclose to appellant facts and circumstances respecting the insured's medical history which were material to the risk and known to them and which were within the scope of the questions contained in the policy application.

3. a) The insured and appellee failed to disclose the names of doctors who had treated the insured; and

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[2] The application was attached to the policy (R 227), which contained the following language:

> "This policy, including the endorsements printed or written hereon or attached hereto by the Company, and the application herefor, a copy of which is attached to and made a part of this policy, constitute the entire contract between the parties. . . ." (R 223)

ORS 736.305 provides:

> "(1) Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract. In that case, if the company delivers a copy of such application to the assured, thereupon such application shall become a part of the insurance contract. If the application is not so delivered to the assured, it shall not be made a part of the insurance contract.
>
> (2) Matters stated in an application shall be deemed to be representations and not warranties."

b) They failed to disclose that the insured had spent 18 days in Holladay Park Hospital, had been diagnosed a paranoid schizophrenic and had received shock treatments during her confinement.

4. Appellant as a matter of law was entitled to rescind the policy.

II

The testimony of Dr. McGee was not material to any issue in the case and was highly prejudicial to appellant. Appellee expressly disclaimed any right to recover based on waiver or estoppel, nor did he claim that the knowledge of Dr. McGee (if any) could or should be imputed to appellant. The testimony was wholly outside the issues drawn by the pretrial order.

ARGUMENT

I

1. Nowhere in answering the questions quoted from the application did the insured and appellee disclose:

a) That she had spent 18 days as a psychiatric patient in Holladay Park Hospital in 1951 and had been found to be suffering from schizophrenia, paranoid.

b) That she had received shock treatments while in the hospital.

c) That she had been treated by two psychiatrists, Dr. Robert Coen and Dr. Herman Dickel.

The failure to disclose these facts constituted legal fraud, and appellant was entitled to rescind the policy.

2. A failure to disclose prior medical treatment known to the insured, if requested by the company, constitutes wilful fraud entitling the company to rescind the policy.

> ". . . There must be an element of wilfulness or knowledge that the statement on that point is untrue, in order to bind the assured. The reason of this is that many times a person may be afflicted with a disease, at least in its incipient stages, without being aware thereof and may answer in good faith that he has not had any such disease. **The representation, however, that he has not consulted or been treated by any other physician is one peculiarly within his knowledge and the law requires in such a case the utmost good faith and full disclosure in answer to direct inquiries on the part of one making an application for the policy."** (Emphasis supplied.) *Mutual Life Insurance Co. v. Chandler*, 120 Or 694 at p. 698, 252 Pac 559 (1927)

Although the extent of the insured's and appellee's knowledge of her diagnosis is uncertain (R 94, 75), both she and appellee, who assisted her in preparing the application and physically wrote a large part of it (R 83-84, 159-160, 162, 227) and who seeks to recover herein as the policy beneficiary, knew all of the other facts set forth above respecting her medical history. Appellee visited Mrs. Montgomery in the hospital daily (R 155) and gave his consent to the shock treatments (R 82-83, 93). He discussed her condition with Dr. Coen and Dr. Cooney (R 66, 77-78, 83, 157, 168-170). Although he would not admit more than the possibility that he, a doctor (R 81-82, 148-149), had ever inquired about or been advised of his wife's diagnosis (R 169-170), Dr. Cooney admitted that the insured's condition, **with specific reference to schizophrenia,** was discussed between them (R 77-78).[3]

3. Dr. Lee testified (and his testimony is undisputed) that these matters were material to the risk and that the policy would not have been issued if they had been known (R 100-108, 119, 120-124). The jury found the questions to be material and that appellant relied on the answers to them (R 16-17). Furthermore, the prior

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[3] Appellee is bound by the contents of the application, and his knowledge and fraud vitiate the policy, because he assisted her to complete the application and is the policy beneficiary. *Gamble v. Metropolitan Life Ins. Co.*, 92 S C 451, 75 S E 788 (1912); Anno: 41 LRA (ns) 1199. Furthermore, the insured was bound by having retained the policy following its issuance. *Comer v. World Ins. Co.*, 65 Or Adv Sh 739, 745, 318 P2d 913, 916 (1957); *Minsker v. John Hancock Mutual Life Ins. Co.*, 254 N Y 333, 173 N E 4 (1930).

medical history of the insured is material as a matter of law. In *Comer v. World Ins. Co.*, 65 Or Adv Sh 739, 745, 318 P2d 913, 916 (1957) the company, on its application form, inquired whether the applicant had received medical or surgical treatment or had any local or constitutional disease within the last five years, to which plaintiff answered "No". In fact, plaintiff had had intestinal trouble resulting from a "marked anxiety tension state" for some months before applying for the policy. He had been in the hospital for 15 days and had been given six electric shock treatments. Thereafter, he continued to have physical ailments resulting from "aggravated anxiety."

In holding that the policy was vitiated by fraud and that plaintiff's retention of the policy charged him with knowledge of the answers, even though he had assertedly told the company's agent the truth when the agent filled out the application (65 Or Adv Sh 745 at pp. 768-769), the Supreme Court of Oregon said:

> "The medical treatment which an applicant has received is material to the prospective insurer inasmuch as the applicant's physicians are best qualified to inform the insurer of the nature and gravity of the disability for which the medical men treated the applicant."[4] (at p. 758)

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[4] See *Martin v. Metropolitan Life Ins. Co.*, 192 F2d 167 (CA 5 1951):
". . . What makes the misrepresentation material is not that the thing misstated caused or contributed to the death, but that it affected the *risk*, and probably influenced the insurer's acceptance of the risk." (at p. 169)

See also *Mutual Life Insurance Co. v. Chandler*, supra, 120 Or 694 at pp. 700-701, 252 Pac 559 (1927); Anno: 131 ALR 617.

4. The fragmentary disclosure in the present case falls wholly short of the information requested and which the insured and appellee were obligated to furnish, and constituted legal fraud.

In *Parker v. Title & Trust Company*, 233 F2d 505 (CA 9 1956) this Court, applying the law of Oregon with regard to half truths contained in insurance applications, said:

> ". . . whatever may be the rule respecting the right of a contracting party to remain silent concerning material facts known to him and which he knows are unknown to the other party, yet if he undertakes to make some statement respecting the matter, he cannot indulge in half-truths. The rule is stated in Pohl v. Mills, 218 Cal. 641, 24 P.2d 476, 481, as follows: ' "Though one may be under no duty to speak as to a matter, if he undertakes to do so, either voluntarily or in response to inquiries, he is bound not only to state truly what he tells, but also not to suppress or conceal any facts within his knowledge which materially qualify those stated. If he speaks at all, he must make a full and fair disclosure." (at p. 510)

See also: *Johnson v. Cofer*, 202 Or 142 at pp. 150-151, 281 P2d 981 (1955); *Dahl v. Crain*, 193 Or 207 at pp. 224-225, 237 P2d 939 (1951); *Palmiter v. Hackett*, 95 Or 12 at pp. 17-18, 185 Pac 1105, 186 Pac 581 (1920).[5]

In *Mutual Life Insurance Co. v. Chandler*, supra, 120 Or 694, 252 Pac 559 (1927) the insured's failure to give the names of all physicians consulted by him in response to a question seeking this information entitled the insurer to rescind the policy. **His knowledge of such medical treatment made the representation wilfully false, whether or not he knew the true nature of his condition.** The court said:

> ". . . The parties were negotiating for the purpose of making a contract of insurance. Each was entitled to the exercise of the utmost good faith on the part of the other. The assured had made an offer to the company couched in certain terms. He said, in substance, 'I am a man who has consulted only one physician whom I name and that merely for mild attacks of influenza and tonsilitis which did not prevent me from working at my usual occupation.' . . .
>
> "Some precedents have been cited where the question was one of fact whether the defendant had the disease or not, or whether the physician was in

[5] See 17 Appleman on Insurance 177 (§ 9493, fn. 27):

> ". . . The rule as to estoppel of the insurer by accepting an incomplete answer was adopted only to apply to such instances where the answer was obviously incomplete, so as to impose the duty on the insurer, acting with reasonable prudence, to inquire further. If the answer is, on its face, complete, there is no reason for the insurer to suspect a fraudulent concealment. and no circumstance calling its attention to the necessity of further investigation. Such semitruths are, at least, semifrauds; and since the purpose of such concealment is obviously to mislead the insurer and to induce reliance by it, the insured should not profit from his wrongful act."

> fact consulted or not, and, on the ground that there was evidence entitled to go to the jury making it a question of fact to be determined, the courts have upheld recoveries against the insurer; but where a direct question is asked by the very terms of the policy a true answer is made material. . . ." (at pp. 700-701)

See also *New York Life Insurance Co. v. Yamasaki*, 159 Or 123, 78 P2d 570 (1938), in which the application for a policy of life insurance contained the following question and answer:

> "2. Within the past two years have you had any illnesses, diseases or bodily injuries or have you consulted or been treated by any physician or physicians? (If so, give full details, including nature, date, and duration of each illness, disease or injury, the name of each physician, and the dates of and reason for consultation or treatment.)
>
> "Ans. No, except sprained ankle July 3, 1935. No fracture. Fully recovered. Dr. Gearey, Westport, Oregon." (at p. 125)

The evidence showed, however, that

> ". . . on July 3, 1935, the insured had sustained a very serious injury by being caught in a propeller shaft, resulting in an injury to his foot, ankle, ribs, back, head and groin and that, at the time he made application for reinstatement of the policy, he was under the care of a physician and seriously ill from the effects of the accident." (at p. 125)

Rescission of the policy by the insurer was sustained:

> ". . . In his application he had not only **falsely represented the seriousness of the accident which he had sustained** but the condition of his health, and had falsely concealed the fact that at the time he was under the treatment of Doctor Holt and was suffering great pain from the injury which he had sustained. If these facts had been disclosed, the reinstatement would not have been granted. . . ." (at pp. 126-127; Emphasis supplied.)

See also: *Northwestern Mutual Life Insurance Co. v. Cohn Bros.*, 102 F2d 74 at pp. 77-78 (CCA 9 1939).

5. The questions contained in Part 2 of the application were answered by Dr. McGee wholly from his limited physical examination and from answers given by the insured. All of the questions were answered **by the insured** (R 136). In response to the following question on Part 2 of the application:

> "10. E. Have you consulted or been treated by any physician for any ailment or disease not included in your above answers? (If so, give full details.)" (R 230)

The insured answered "*Yes—Nervousness—Before and after above surgery—Excellent—Dr. Joe Cooney.*" (R 230)[6]

[6] Compare the answer to questions 28 and 29 of Part 1 of the application, in which, in answer to similar questions, the insured gave similar incorrect answers.

Dr. McGee may not have filled out this portion of the application (R 133; see also R 129, 132, 147-148).

Admittedly two physicians (Dr. Coen and Dr. Dickel) were consulted in connection with this "ailment" who were not named. Dr. Lee testified to the materiality of the identity of these doctors:

> "Q. Would it have been any more notice to you or to Bankers Union Life if the words nervousness had been put down on the ailment which Mrs. Montgomery allegedly suffered from and had she listed Dr. Coen and Dr. Dickel and whatever the name of the man was, the doctor in the field of neurology?
>
> A. Definitely, because then we would have immediately figured that she had some mental disease that required specialists to help in.
>
> Q. Would the mere fact that the names of the doctors were given indicate to you they were specialists?
>
> A. No, we look them up in the directory and then we find out. We look them up in the medical directory and find out what their specialties are." (R 124)

Furthermore, the designation of "nervousness" did not disclose the diagnosis of schizophrenia, paranoid (R 115-116, 119-120), and the reference to surgery convinced the company that the condition was casual and temporary and did not justify further investigation. It did not suggest a serious mental illness (R 114-116, 120, 227, 230).

6. Question 33 of Part 1 of the application (R 17, 227) and its answer were:

> "Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the company should be advised? (If none, please state 'None'.)
>
> "*None*"

In the leading case of *Stipcich v. Metropolitan Life Ins. Co.*, 277 US 311, 48 S Ct 512, 72 L ed 895 (1928), which concerned the effect of the failure of the insured to disclose a condition arising after he made application for a policy but prior to its issuance, the court said:

> "Insurance policies are traditionally contracts *uberrimae fidei* and a failure by the insured to disclose conditions affecting the risk, of which he is aware, makes the contract voidable at the insurer's option. . . ."
>
> * * * * *
>
> ". . . For, even the most unsophisticated person must know that in answering the questionnaire and submitting it to the insurer he is furnishing the data on the basis of which the company will decide whether, by issuing a policy, it wishes to insure him. . . ." (at pp. 316-317)

See also *Cohen, Friedlander (etc.) Co. v. Massachusetts Mutual Life Ins. Co.*, 166 F2d 63 (CCA 6 1948)

Appellee and the insured both knew of this medical history, but failed to suggest or disclose it to appellant. Both the questions and the law imposed an affirmative burden on them to disclose these facts, facts which were hidden behind the quarter truth of "nervousness." The legal fraud in this case stands admitted, and appellant was entitled as a matter of law to rescind the policy.

7. Finally, it was legal fraud to describe the insured's condition as "nervousness" in answer to Question 28 of Part 1 of the application. One might as well describe pneumonia as a cold, or an ulcer as an upset stomach. The answer was, on its face, incorrect and misleading.

No issue was presented for the jury's consideration. As a matter of law the answers in the application were wilfully false and a verdict should have been directed for appellant.

II

Dr. McGee's testimony that he knew when Mrs. Montgomery was in his office that she had been in Holladay Park Hospital, although he could not recall

when he received this information or whether it was discussed at that time (R 144-145), was peculiarly damaging to appellant and was immaterial to any issue in the case. It was error for the trial court to receive it.

The testimony was assertedly admitted on the ground

> "that she may have divulged the information to him and he, in his judgment, elected not to put it down." (R 139)[7]

1. The question of notice to the company through Dr. McGee of the insured's medical history was not an issue in the case. Counsel for appellee repeatedly assured the court that there was no assertion of waiver or estoppel, nor was it ever suggested that Dr. McGee's knowledge (if any) could or should be imputed to ap-

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[7] In the course of denying appellant's motion for a new trial, the trial court expanded its ruling as follows:

> ". . . The question that was asked Dr. McGee was: did she tell him that she had been in Holladay Park Hospital, and then the answer came out he did not know whether she told him at that time or whether he knew it from his own information. It was my view at that time, and it is my view now that the plaintiff was entitled to have that testimony before the jury.
>
> "If she had told him that she had been to the Holladay Hospital during that examination and he, himself, failed to put it down, that would have been an interpretation which he gave to those questions. Even though it is not admissible on the question of notice, it certainly is admissible on the question of what was divulged to Dr. McGee at the time of the examination. An insured is not responsible if Dr. McGee fails to put down all the information divulged to him, and that was the basis upon which I decided that the testimony of Dr. McGee was admissible.
>
> "To clarify, further, he didn't know whether she had told him or whether he had known it from prior information. (R 218-219)

pellant (R 79, 214). No such issue was pleaded (R 4-7, 8) or drawn in the pretrial order (R 10-12).[8] However, on final argument counsel asserted to the jury that appellant should have consulted Dr. McGee before issuing the policy (R 193).

2. This was **the only testimony** suggesting that the matter of Mrs. Montgomery's hospitalization was brought to Dr. McGee's attention or was otherwise in his mind when the application was made out. It did not bear on the question, since **it showed only that he had no recollection of the fact whatever.** Yet it was admitted on the theory that it showed the doctor's contemporaneous knowledge of her medical history and his election not to disclose it.

It did not constitute substantial evidence of such notice, since it was expressed only in terms of possibility and not probability. Repeatedly during the offer of proof, Dr. McGee told the court that he simply did not remember whether or not he had discussed the

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[8] The medical history portion of Part 2 of the application may not even have been written by Dr. McGee:

"Q. This question (e), 'Have you consulted or been treated by any physician for any ailment or disease not included in your above answers,' there was the word, 'No'; then it was crossed out, and it was, 'Yes.' 'Name of Ailment — Nervousness — before and after above surgery — excellent — Dr. Joe Cooney.'

I would like to hand this back, give it to you, Dr. McGee, and ask you if you know whether that is in your writing or in whose writing that is?

A. That is not in my writing.

Q. That is printed?

A. That's right." (R 133; see also R 147-148)

subject with the insured (R 135-137). See *Henderson v. Union Pacific Railroad Co.*, 189 Or 145 at pp. 160-161, 219 P2d 170 (1950). There was no other evidence suggesting that Dr. McGee had any of these matters in his mind during Mrs. Montgomery's visit or made any election not to disclose it. There was no circumstantial or indirect evidence with which it might have been considered. In short, this testimony fulfilled no purpose whatever, but stood alone before the jury, to whom it could only suggest knowledge or notice which was not claimed and which did not exist. The evidence was prejudicial and damaging and was immaterial to any issue in the case.

CONCLUSION

The record in this case demonstrates conclusively that appellee's case failed on the merits and that appellant's motion for a directed verdict should, as a matter of law, have been granted and, in addition, that errors occurred during the trial with respect to the admission of evidence which would require a new trial. This Court is now requested to do what the trial court should have done and direct entry of judgment for appellant. If the Court should disagree with this conclusion, it should grant appellant a new trial.

Respectfully submitted,

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF

JOHN GORDON GEARIN

JAMES H. CLARKE

Attorneys for Appellant
800 Pacific Building
Portland 4, Oregon

APPENDIX

EXH	IDENT	OFF	REC
Def Ex 1 (R 221-229)	R 12-13	R 38	R 39
Def Ex 2A (R 230-231)	R 99, 127-128	R 128	R 128
Def Ex 3A (R 227)	R 12-13, 84, 99	R 84	R 84
Def. Ex 6A	R 12-13	R 39	R 39

No. 15918

United States
Court of Appeals
for the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Appellant,

vs.

JOHN LYLE MONTGOMERY,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the District of Oregon

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—4-10-58

No. 15918

United States
Court of Appeals
for the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Appellant,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

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Attorneys for Appellee.

In the United States District Court
For the District of Oregon

Civil No. 8846

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Defendant.

PETITION FOR REMOVAL

Defendant, for the purpose of presenting this petition, shows that heretofore and on or about the 3rd day of October, 1956, plaintiff brought this action against defendant in the Circuit Court of the State of Oregon for the County of Multnomah.

Plaintiff, at the time of the commencement of said action, was and now is a citizen of the State of Oregon, and defendant was and now is a Colorado corporation.

This action is one of a civil nature in which there is now a controversy between citizens of different states, and the amount in controversy, exclusive of interest and costs, exceeds the sum of $3,000.00.

Attached hereto as Exhibits A and B respectively

are copies of the summons and complaint served upon defendant in said action in said Circuit Court.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

Duly Verified.

Acknowledgment of Service Attached.

EXHIBIT "A"

In the Circuit Court of the State of Oregon
For the County of Multnomah

No. 234840

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Defendant.

COMPLAINT

Comes now Plaintiff and for cause of action against Defendant complains and alleges:

I.

That at all times herein mentioned, the Defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Colorado and is duly qualified to transact a life insurance business in the State of Oregon.

II.

That on or about the 13th day of October, 1954, the Defendant, in consideration of a premium to it paid by Anna Grace Montgomery, executed and delivered to said Anna Grace Montgomery a policy of life insurance, said policy being in writing and being Policy No. 27244, wherein and whereby it agreed to pay to John Lyle Montgomery, the husband of Anna Grace Montgomery, as beneficiary, the sum of Fifteen Thousand ($15,000.00) Dollars in the event of the death of Anna Grace Montgomery.

III.

That subsequent to the issuance of said policy and on or about the 27th day of October, 1954, the Defendant executed, issued and delivered to Anna Grace Montgomery, a supplemental agreement attached to and made a part of Policy No. 27244, in which Defendant agreed that in consideration of an additional premium and in the event of accidental death, an additional sum of Fifteen Thousand ($15,000.00) Dollars, over and above the amount payable hereinbefore alleged, would be paid to John Lyle Montgomery, as beneficiary.

IV.

That thereafter and while said policy and supplemental agreement were in full force and effect and on or about the 20th day of January, 1956, Anna Grace Montgomery died as the result of accidentally falling and striking her head, while vacationing in Puerto Vallarta, Jalisco, United States of Mexico, at the Rosita Hotel.

V.

That thereafter and on or about the 12th day of March 1956, Plaintiff forwarded to the Defendant the Proof of Death form required by the Defendant, together with a copy of the Death Certificate, and has otherwise performed all of the conditions of said policy on his part to be kept and performed.

VI.

That although demand has been made upon the Defendant by the Plaintiff for the payment of said Thirty Thousand ($30,000.00) Dollars due under the terms and conditions of said policy, Defendant has failed and refused, and now fails and refuses, to pay to the Plaintiff said amount due under the terms and conditions of said policy.

VII.

That more than six months have elapsed since proof of death was given Defendant and it was and is necessary for Plaintiff to employ attorneys to bring this action and the sum of Six Thousand ($6,000.00) Dollars is a reasonable amount that Defendant should be required to pay as Plaintiff's attorney fees in this cause of action.

Wherefore, Plaintiff prays for judgment against Defendant in the sum of Thirty Thousand ($30,000.-00) Dollars, with interest thereon at the rate of Six (6%) Percent per annum from January 20, 1956, and for the further sum of Six Thousand ($6,000.00)

Dollars as Plaintiff's attorney fees and for costs and disbursements incurred herein.

BENSON & DAVIS,
Attorneys for Plaintiff.

EXHIBIT "B"

In the Circuit Court of the State of Oregon
for the County of Multnomah

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Defendant.

SUMMONS

To Bankers Union Life Insurance Company, a corporation, Defendant:

In the Name of the State of Oregon: You are hereby required to appear and answer the Complaint filed against you in the above entitled action within ten days from the date of service of this Summons upon you, if served within this County; or if served within any other County of this State, then within twenty days from the date of the service of this Summons upon you; and if you fail so to answer, for want thereof, the Plaintiff will take judgment against you in the sum of Thirty Thousand ($30,000.00) Dollars, with interest thereon at the rate of Six (6%) Percent per annum from January 20, 1956, and for the further sum of Six Thou-

sand ($6,000.00) Dollars as Plaintiff's attorney fees and for costs and disbursements incurred herein.

BENSON & DAVIS,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 10, 1956.

[Title of District Court and Cause.]

REPLY

Comes now Plaintiff and for reply to Defendant's Answer on file herein, admits, denies and alleges as follows:

I.

Denies each and every matter, allegation and thing contained in said Answer, and the whole thereof, except as may be consistent with Plaintiff's complaint on file herein.

Wherefore, having fully replied to Defendant's Answer, Plaintiff prays that same be held for naught, that Defendant take nothing thereby, and that Plaintiff do have and recover judgment against Defendant as originally demanded in Plaintiff's complaint.

W. F. WHITELY,
BENSON & DAVIS,
/s/ By W. F. WHITELY,
Attorneys for Plaintiff.

Acknowledgment of Service Attached.

[Endorsed]: Filed Oct. 12, 1956.

[Title of District Court and Cause.]

AMENDED ANSWER

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

Defendant denies each and every, all and singular, the allegations contained in the complaint except it admits:

I.

Defendant admits the allegations of paragraph I of the complaint.

II.

On or about the 27th day of October, 1954, the defendant issued upon the life of Anna Grace Montgomery its policy No. 27244 in the amount of $15,000.00 with accidental death benefits.

III.

Defendant admits further that Anna Grace Montgomery is alleged to have died in the United States of Mexico, admits that on March 12, 1956 John Lyle Montgomery presented to defendant purported proof of death, admits that defendant has not paid plaintiff as alleged beneficiary, and denies specifically that $6,000.00, or any lesser amount, is a reasonable amount to be awarded as attorneys' fees to plaintiff.

Third Defense

The policy referred to in the complaint and in

the amended answer hereto was issued solely in reliance upon false statements made by Anna Grace Montgomery and by John Lyle Montgomery and not otherwise.

Prior to the filing of the complaint herein the defendant tendered to plaintiff the premiums paid under the policy of insurance together with interest and rescinded said contract or policy, but said tender and rescission was rejected and refused by the plaintiff. The amount of said tender together with interest to date is hereby deposited in the Registry of this Court for the benefit of the plaintiff.

Wherefore, having fully answered plaintiff's complaint, defendant prays for judgment.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

Affidavit of Service Attached.

[Endorsed]: Filed Oct. 23, 1956.

[Title of District Court and Cause.]

PRETRIAL ORDER

The above entitled cause came on regularly for pretrial conference before the undersigned judge of the above entitled court on Monday, November 25, 1957. Plaintiff appeared by William F. Whitely and Alan F. Davis, his attorneys. Defendant appeared by John Gordon Gearin, of its attorneys.

Nature of Action

This is an action to recover from a policy of life insurance issued by the defendant upon the life of Anna Grace Montgomery in which plaintiff is designated as beneficiary.

Admitted Facts

I.

Defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of Colorado and is duly qualified to transact business in the State of Oregon.

II.

Prior to the filing of the complaint herein defendant issued its policy No. 27244-D which is attached hereto as Pretrial Exhibit No. 1.

III.

On or about the 20th day of January, 1956, Anna Grace Montgomery died as the result of an accident and thereafter on March 12, 1956 plaintiff submitted to defendant proof of death. Timely demand was made by plaintiff upon defendant for the payment of the amount due on said policy, which demand has been refused by the defendant and no money has been paid to plaintiff by or on behalf of this defendant. Prior to the filing of the complaint herein, defendant notified plaintiff that it rescinded said policy and tendered to plaintiff the amount of the premiums together with interest, but this rescission and tender were rejected and refused by the plaintiff.

Plaintiff's Contentions

I.

Plaintiff contends that by reason of the policy defendant is obligated to pay to the plaintiff the sum of $30,000.00 together with interest and attorneys' fees in the sum of $6,000.00.

Defendant's Contentions

I.

Defendant contends that the insurance policy was issued by the defendant solely in reliance upon false statements made by the said Anna Grace Montgomery and the plaintiff and not otherwise. That the representations made by the deceased and/or plaintiff were material, that they were not true and that the policy would not have been issued had the true facts been known.

Each party denies the contentions of the other.

Issues To Be Determined

1. Did the insured, Anna Grace Montgomery, and/or the plaintiff make misrepresentations of fact to the defendant?

2. If so, was such misrepresentation as to material facts?

3. Was the policy issued by the defendant in reliance upon said statements?

4. What is the amount of attorneys' fees to which the plaintiff is entitled to recover?

Physical Exhibits

Certain physical exhibits have been identified and

received as pretrial exhibits, the parties agreeing, with the approval of the court, that no further identification of exhibits is necessary. In the event that said exhibits, or any thereof, should be offered in evidence at the time of trial, said exhibits are to be subject to objection only on the grounds of relevancy, competency and materiality.

Exhibits

1. Policy No. 27244-D.
2. Deposition of Dr. Lewis W. Lee.
3. Deposition of Dr. Montgomery (and exhibits).
4. Deposition of Dr. Cooney (and exhibits).
5. Deposition of Dr. Coen (and exhibits).
6. Hospital Records:

(a) Holladay Park Hospital
(b) Portland Osteopathic Hospital

The parties hereto agree to the foregoing pretrial order and the court being fully advised in the premises,

Now Orders that the foregoing pretrial order shall not be amended except by consent of both parties, or to prevent manifest injustice; and it is further

Ordered that the pretrial order supersedes all pleadings; and it is further

Ordered that upon trial of this cause no proof shall be required as to matters of fact, hereinabove specifically found to be admitted, but that proof upon the issues of fact (and law) between plaintiff and defendant as hereinabove stated shall be had.

Dated at Portland, Oregon, this 9th day of December, 1957.

/s/ GUS J. SOLOMON,
United States District Judge.

Approved:

/s/ W. F. WHITELY,
Of Attorneys for Plaintiff.

/s/ JOHN GORDON GEARIN,
Of Attorneys for Defendant.

[Endorsed]: Filed Dec. 9, 1957.

[Note: Interrogatories to the Jury are included in the Judgment set out at pages 16-17 of this printed record.]

[Title of District Court and Cause.]

MINUTE ORDER

November, 1957 Term. Tuesday, Dec. 10, 1957. Solomon, Judge, Reporter: G. G., Deputy: Davis.

Record of further jury trial; arguments of counsel; court instructs jury and jury retires for deliberations at 11:30 a.m. approx. Order for jury meals.

Jury returns with answers to special interrogatories at 3:10 p.m. Jury polled: all affirming. Order to enter judgment for plaintiff for $30,000 on the special interrogatories. Order to file interrogatories.

Order allowing plaintiff sum of $5000 as attorneys' fees.

In the United States District Court
for the District of Oregon

Civil No. 8846

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Defendant.

JUDGMENT

The above-entitled action came on duly and regularly for trial on the 9th day of December, 1957, before the Honorable Gus J. Solomon, Judge of the above-entitled Court, the Plaintiff appearing in person and by his attorneys, W. F. Whitely and Alan F. Davis, and the Defendant appearing by and through one of its attorneys, John Gordon Gearin; and the jury having been duly and regularly empaneled and sworn to try said case, did hear evidence on behalf of the Plaintiff and the Defendant and arguments of counsel, and the Court duly instructed the jury and submitted to the jury written interrogatories, and the jury did thereafter retire to consider its verdict and returned into Court on the 10th day of December, 1957, its written interrogatories, which interrogatories, after setting forth the title of this Court and the cause, read as follows:

"We, the jury, make the following answers to the special interrogatories submitted to us relative to

the application filed by Anna Grace Montgomery with the Bankers Union Life Insurance Company:

1.

'27. Have you had or have you ever been told you have or have you ever been treated for:

'(e) Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells? No.'

(a) Was such answer wilfully false? ( ) Yes. (x) No.

(b) Was such answer material? (x) Yes ( ) No.

(c) Did the defendant rely on it? (x) Yes ( ) No.

2.

'28. Name below all causes for which you have consulted a physician or healer in the last ten years; give details: (Include also particulars of any 'Yes' answer to Question 27.)

'Disease or injury (If none, state 'None')

Nervousness. Date: 2 yrs. ago. Duration: About 2 mos.

Complications: None. Was Operation Performed .

Results: Excellent. Name and address of attending physician or healer: Joseph Cooney.

Disease or injury: Suspension (Uterus). Date: 3 yrs.

Duration: . Complications: None. Was Operation Performed: . Results: Excellent. Name and address of attending physician or healer: Dr. Ira Neher.'

(a) Was such answer wilfully false? ( ) Yes. (x) No.

(b) Was such answer material? (x) Yes. ( ) No.

(c) Did defendant rely on it? (x) Yes. ( ) No.

3.

'29. Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not included in any of the above answers? (If yes, give full particulars)? (x) No.'

(a) Was such answer false? ( ) Yes. (x) No.

(b) Was such answer wilfully false? ( ) Yes. (x) No.

(c) Was such answer material? (x) Yes. ( ) No.

(d) Did the defendant rely on it? (x) Yes. ( ) No.

4.

'33. Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the Company should be advised? (If none, please state 'None') None'

(a) Was such answer wilfully false? ( ) Yes. (x) No.

(b) Was such answer material? (x) Yes. ( ) No.

(c) Did the defendant rely on it? (x) Yes. ( ) No.

Dated this 10th day of December, 1957.

/s/ FLORENCE BERRY,
Foreman."

The Court thereupon polled the jury and received the interrogatories as the verdict of the jury in this case and ordered the same filed and the jury was

discharged from further consideration of the case.

Based upon the foregoing proceedings and the written interrogatories,

It Is Considered, Ordered and Adjudged that Plaintiff take, have and recover of and from the Defendant judgment in the sum of Thirty Thousand ($30,000.00) Dollars, with interest thereon at 6% per annum from March 12, 1956, until paid; and

It Is Further Considered, Ordered and Adjudged that Plaintiff, pursuant to stipulation of the parties that the Court determine the amount of attorneys fees to be allowed herein, have the sum of Five Thousand ($5,000.00) Dollars as and for attorneys fees; and

It Is Further Considered, Ordered and Adjudged that the sum of $59.75 be allowed for Plaintiff's costs and disbursements incurred herein.

Dated at Portland, Oregon, this 10th day of December, 1957.

/s/ GUS J. SOLOMON,
Judge.

[Endorsed]: Filed Dec. 11, 1957.

[Title of District Court and Cause.]

MOTION

Defendant, pursuant to the provisions of Rule 50, moves the court to have the special verdict, i.e., the interrogatories, of the jury set aside and the judgment based thereon in favor of plaintiff and against defendant in the sum of $30,000.00 and the

further sum of $5,000.00 likewise set aside, and have judgment entered in accordance with its motion for directed verdict interposed at the close of all the evidence in this cause on Monday, December 9, 1957.

Defendant will contend that its motion for directed verdict was not granted when under the fact and law it should have been granted, as there was no genuine issue as to any material fact, and that defendant was entitled to judgment in its favor as a matter of law.

In the alternative, defendant, pursuant to the provisions of Rule 59, moves the court for an order setting aside the special verdict of the jury, i.e., the interrogatories, and the judgment based thereon, and granting to the defendant a new trial.

The grounds of this motion are that the verdict was contrary to the law and was not sustained by the evidence, it being manifestly against the weight of the evidence, i.e., the evidence affirmatively disclosed that the plaintiff and the deceased, Anna Grace Montgomery, withheld vital and important information relating to the physical and mental condition of the deceased, and failed to make true answers to the questions propounded in the application for insurance.

Defendant further contends, in support of its motion for new trial, that the special verdict, i.e., the interrogatories, of the jury were inconsistent and are insufficient to support a judgment in favor of plaintiff and against defendant. More specifically, defendant will contend that the jury found

that the answers made by the applicant and the plaintiff were not wilfully false when, at the same time, found that the answers were material and that the defendant relied upon them in issuing the policy.

As a further ground in support of its motion for new trial, defendant will contend that the court committed error in one or more of the following particulars:

1. The court permitted Dr. McGee to testify over the objection of the defendant, that he knew from his social contacts with the Montgomery family and his professional acquaintance with Dr. Montgomery that the deceased had been confined to Holladay Park Hospital. This testimony was highly prejudicial to the defendant, particularly since plaintiff made no claim of waiver or estoppel, nor did plaintiff claim that this knowledge was imputed to the defendant. Furthermore, such testimony was immaterial to any issue raised by the pretrial order because as a matter of law, regardless of any position that may or may not have been taken by plaintiff, the knowledge of an insurer's agent acquired outside the scope of his agency is not imputable to the principal.

2. The court erred in permitting, over the objection of the defendant, Dr. Dickel to testify as to the answers which he, as a psychiatrist, would have given to the questions contained in the application. This evidence was immaterial to any issue in the case and was highly prejudicial to the defendant.

3. The court erred in rejecting defendant's offer into evidence of the office records of Dr. Robert A. Coan, which records were identified by Dr. Dickel and were used by him as a basis for his testifying in this case.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
/s/ JOHN GORDON GEARIN,
Attorneys for Defendant.

I, John Gordon Gearin, one of attorneys for defendant, hereby certify that the foregoing Motion is made in good faith and not for the purpose of delay.

/s/ JOHN GORDON GEARIN.

Acknowledgment of Service Attached.

[Endorsed]: Filed Dec. 13, 1957.

[Title of District Court and Cause.]

MINUTE ORDER

Nov. 1957 Term. Monday, Dec. 23, 1957. Solomon, Judge. Reporter: DT. Deputy: Davis.

Record of hearing on defendant's motion to set aside verdict and judgment. Order denying both motions.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that defendant Bankers Union Life Insurance Company appeals to the

United States Court of Appeals for the Ninth Circuit from each and every part of the final judgment entered in this action on December 10, 1957 and the whole thereof.

The time for filing this notice of appeal was extended under Rule 73(a) FRCP to January 22, 1958, being thirty (30) days following entry by the Court on December 23, 1957, of an order denying appellant's timely motions for judgment n.o.v., or, in the alternative, for a new trial under Rules 50 and 59 FRCP.

Dated this 7th day of January, 1957.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 8, 1958.

[Title of District Court and Cause.]

ORDER

For good cause shown the Court hereby extends for sixty (60) days from and after January 8, 1958 the time within which to serve and file defendant's statement of points to be relied on and within which (1) to file the reporter's transcript of the evidence and proceedings included in its designation; (2) to file the record on appeal; and (3) to docket the appeal herein. This order is made before

the expiration of the period originally prescribed for the same.

Dated at Portland, Oregon, this 8th day of January, 1958.

/s/ GUS J. SOLOMON,
United States District Judge.

[Endorsed]: Filed Jan. 8, 1958.

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal:

1. Petition for Removal;
2. Exhibit A—Complaint;
3. Exhibit B—Summons;
4. Amended Answer;
5. Reply;
6. Pretrial Order;
7. Verdict and Interrogatories to Jury and Direction for Entry of Judgment;
8. Judgment;
9. Judgment Order;
10. Motion for Judgment n.o.v.;
11. Order Denying Motion for Judgment n.o.v.;
12. Reporter's transcript of all of the Evidence and all of the Proceedings had at the trial;

13. All exhibits offered and received in evidence;

14. All exhibits offered but not received in evidence;

15. Notice of Appeal;

16. Statement of Points to be Relied Upon;

17. This Designation;

18. All orders extending the time within which to file the record on appeal and docket the appeal.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Jan. 8, 1958.

[Title of District Court and Cause.]

POINTS ON WHICH APPELLANT INTENDS TO RELY

On the appeal in this action, appellant will rely on the following points:

1. The trial court erred in denying appellant's motion for a directed verdict. The evidence was conclusive and undisputed that:

a) the application for the policy of life insurance which is the subject of this action, which application was submitted to appellant by the deceased insured and attached to said policy, contained wilfully false answers to questions contained therein;

b) said answers were material to the risk assumed by appellant;

c) appellant relied upon said answers in issuing said policy.

2. The trial court erred in ordering entry of judgment based on the answers of the jury to special interrogatories submitted to them by the Court, because there was no evidence to support the findings therein that the answers to questions contained in the said application for life insurance to which the interrogatories referred were not wilfully false, and the evidence was conclusive and undisputed that they were wilfully false.

3. The trial court erred in failing to allow appellant's motion to set aside the special verdict of the jury and the judgment based thereon and for entry of judgment for appellant, or, in the alternative, granting appellant a new trial.

4. The trial court erred in permitting Dr. Herman Dickel, a psychiatrist, to testify, over appellant's objection, to the manner in which he would have answered the said questions contained in the said application for life insurance assuming that he, having himself had the history, diagnosis and treatment of the deceased insured, had filled it out on his own behalf. The wilful falseness of the said answers in the application for life insurance submitted to appellant by the deceased insured was an issue in the case.

5. The trial court erred in failing, upon the request of appellant, to mark the office records of Dr. Robert A. Coan, as exhibits in the case, and

thereafter, upon the offer of appellant, to admit the same in evidence.

6. The trial court erred in permitting Dr. Robert C. McGee to testify, over appellant's objection, that he knew from his social contacts with appellee's family and his professional acquaintance with appellee that the deceased had been confined to Holladay Park Hospital prior to execution of the said application for life insurance. Appellee made no claim of waiver or estoppel, nor did he claim that the knowledge of Dr. McGee was or should be imputed to appellant; the testimony was immaterial to any issue raised or presented by the pre-trial order.

KOERNER, YOUNG, McCOLLOCH
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 24, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF PORTIONS OF THE RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Appellant designates the following portions of the record, proceedings, and evidence to be contained in the record on appeal in addition to the

portions thereof contained in its original designation:

19. Order denying motion for directed verdict;
20. This supplemental designation.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Defendant.

Acknowledgment of Service Attached.

[Endorsed]: Filed Feb. 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
District of Oregon—ss.

I, R. DeMott, Clerk of the United States District Court for the District of Oregon, do hereby certify that the foregoing documents consisting of Petition for removal; Reply; Amended answer; Pretrial order; Interrogatories; Order to enter judgment; Judgment; Motion of defendant to have verdict, interrogatories and judgment set aside, etc.; Record of hearing on defendant's motion to set aside verdict and judgment, etc.; Notice of appeal; Supersedeas bond; Order extending time to docket appeal; Designation of portions of record to be contained in record on appeal; Order for transmit-

tal of exhibits to Court of Appeals; Points on which appellant intends to rely; Supplemental designation of portions of record to be contained in record on appeal and Transcript of docket entries constitute the record on appeal from a judgment of said court in a cause therein numbered Civil 8846 in which Bankers Union Life Insurance Company, a corporation is the defendant and appellant and John Lyle Montgomery is the plaintiff and appellee; that the said record has been prepared by me in accordance with the designation of contents of record on appeal filed by the appellant, and in accordance with the rules of this Court.

I further certify that there is enclosed herewith the reporter's transcript of testimony and proceedings and the transcript of proceedings in re: Defendant's motions to set aside verdict and for a new trial. Under separate cover we are forwarding exhibits Nos. 1; 2; 2-A; 3; 3-A; 4; 5; 6-A and 6-B.

I further certify that the cost of filing the notice of appeal, $5.00, has been paid by the appellant.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court in Portland, in said District, this 4th day of March, 1958.

[Seal] R. DeMOTT,
Clerk,

/s/ By THORA LUND,
Deputy.

United States District Court,
District of Oregon

Civil No. 8846

JOHN LYLE MONTGOMERY, Plaintiff,

vs.

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Portland, Oregon, December 9, 1957
9 A.M.

Before: Honorable Gus J. Solomon, District Judge, with a Jury.

Appearances: Messrs. William F. Whitely and Alan F. Davis, Attorneys for Plaintiff; Mr. John Gordon Gearin, of Attorneys for Defendant.

Court Reporter: Gordon R. Griffiths. [1*]

(A jury having been duly empaneled and sworn to try the above-entitled cause and having retired to the jury room, the following proceedings were had out of the presence of the jury:)

Mr. Gearin: Your Honor, an interesting question has come up. In view of the issues in the case, wouldn't the defendant go first?

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* Page numbers appearing at top of page of Reporter's Transcript of Record.

The Court: Yes.

Mr. Gearin: Who would close? We have the burden of proof on our affirmative matters, and we admit the policy.

The Court: You will go first. You will open, and you will close because you have the burden of proof.

Mr. Davis: You mean we do not have the closing argument, your Honor?

The Court: No, you would not because you do not have the opening. He admitted in the pretrial order the issuance of the policy, and he has the burden.

Mr. Davis: I think that is true as far as the evidence is concerned, but I feel we would have the right to opening and closing argument.

The Court: I do not think so. We have had that up before. You will go first, Mr. Gearin, and I shall tell [2] the jury that you have the burden of proof.

(Thereupon, the jury returned to the jury box and the following proceedings were had in open court:)

The Court: What have you decided on attorneys' fees?

Mr. Davis: We will leave it up to the Court.

Mr. Gearin: I think, your Honor, we would be entitled to have the matter passed on by the trier of the facts.

The Court: Do you want the jury to try it?

Mr. Gearin: Yes, sir.

The Court: Then he will go first because he has the burden on that.

Mr. Gearin: I will submit to the Court.

The Court: Ladies and gentlemen, as I explained to you previously, the company admits it issued the policy; therefore, the case will be determined on the defenses of the company. That being the case, the company has the burden of proof, and even though they are the defendant they will go forward with the first opening statement, and they will put on their evidence first also. Proceed.

Mr. Gearin: If the Court please, ladies and gentlemen, the issues in this case I think are rather short.

In October of 1954 the company, in response to a written application which was executed by Mrs. Anna Grace Montgomery and by the plaintiff, Dr. Montgomery, issued a [3] policy of life insurance which provides a payment of $15,000 on her death while it was in effect, and an additional sum if the death was accidental. Within a two year period following the execution of the policy, Mrs. Montgomery died an accidental death. Subsequent thereto, the plaintiff made proof of loss.

Upon inquiry into the facts surrounding the matter, the company declined to pay and rescinded the contract and offered to pay back the amount of the premiums to the plaintiff. That was not accepted, and the amount of the premiums, after this case was filed, together with interest, was tendered into the registry of this court.

The question then before the Court is whether or not the deceased, that is, the insured, Mrs. Montgomery, made misleading or false statements in the application that was made. In this case the application was completed by the plaintiff, that is Dr. Montgomery, with his wife. They were by themselves and they sat, the testimony will be, and went over the questions and answers, the printed questions and answers in the application.

Now, it developed, and I think without any controversy, these facts. In 1951 Mrs. Montgomery had been indisposed for a period of time. Her condition became progressively worse, and at that time she was taken by an ambulance, in the company of Dr. Montgomery, to [4] Holladay Park Hospital which I think will be described as a psychiatric hospital. She was there for a period of a few days. She came back home, and late, I believe this was in March, in April of that year she went there for a prolonged period of time. She was given electric shock treatments, some five, I believe, in number, which the doctor will explain to you is something that is rather severe. An electric shock is put through electrodes from one side of the head to another with such intensity and with such voltage that it produces unconsciousness and convulsions in the person, a person taking the treatments. Dr. Montgomery, the plaintiff in this case, gave his written consent to those electric shock treatments because the hospital will not do it unless they have the consent of all concerned.

She was treated at that time by several—I think

a neurosurgeon or neurologist consulted with her. She was treated by a psychiatrist, a Dr. Robert Coen. His deposition has been taken. His testimony will be here.

As shown by the hospital records that we will have in the case, Mrs. Montgomery's condition was diagnosed as that of a schizophrenic paranoid which is a form of serious and severe mental illness. Those facts are here without dispute, and the testimony likewise, we submit, will appear without dispute by the medical director of [5] the company that had the company been advised that Mrs. Montgomery was suffering from this mental illness, schizophrenia, paranoid—I think that is the way the doctors, the psychiatrists, have of describing it —the policy would not have been issued.

We feel that we were not advised to the facts, and the truth of the matter was concealed from us because in the application which you people will have with you when the case is submitted you will find these questions and answers. They asked the applicant to name all the causes for which, "You have consulted a physician or healer in the last ten years." You remember the date, as it will show, was in 1954. Three years previously she was in the hospital as we have described. The answers made by the deceased, by the plaintiff in this, Dr. Montgomery, was that about two years prior thereto she had been treated for nervousness for about two months and that she had a uterine suspension. Dr. Joseph Cooney whose name was mentioned, also Dr. Ira Neher, they were also asked this ques-

tion: "Have you ever been treated for mental derangement?" The answer was No. "Have you ever been treated for nervous prostration," and the answer is No.

The evidence will show that the application was prepared, again I repeat, by the applicant—that is Mrs. Montgomery—and by the plaintiff, the doctor here. [6] Then again, in the application which was executed in the manner that I have described was: "Have you ever consulted with any physician for any ailment, not included in any of the above answers?" To which the answer was No.

We feel then that the condition as we know it of schizophrenia, paranoid when the lady was treated by a psychiatrist, was withheld from the company, both the nature of the mental illness and the fact that she had been treated by Dr. Coen, a psychiatrist, and I believe other doctors were called in consultation. She was also seen by another psychiatrist, I believe by a Dr. Herman Dickel, who is in the courtroom. I think he will be able to testify on that subject sometime along the course of the trial.

We ask that you keep an open mind until everything is in including evidence on both sides of the case. I think the evidence will satisfy you, members of the jury, that this was a serious mental illness, but it was concealed from the company and that the company would not have issued the policy had the true facts been known. Thank you.

The Court: Mr. Davis.

Mr. Davis: If your Honor please, Mr. Gearin, ladies and gentlemen of the jury. The evidence briefly will show that Dr. Montgomery and his wife, basically Dr. Montgomery was contacted by an insurance man with the Bankers Life Insurance Company with regard to taking out a life insurance [7] policy. They had discussed the policy, and the policy basically was to be taken out by Dr. Montgomery for the sum of $30,000. The agent in working it out had mentioned to him about that the premium would be less if they split it equally, if Dr. Montgomery would take $15,000 and Mrs. Montgomery would take $15,000. Then about two weeks later what would be called an additional for accidental injuries was included, or accidental injuries was included, or accidental death, an additional $15,000 on each of their policies. Now, the application form was left by the agent for Dr. and Mrs. Montgomery to fill out, and it was taken home. It was filled out. Dr. Montgomery filled it out, and Mrs. Montgomery assisted, and both of them filled it out together. I think the testimony will show that parts of this are in Dr. Montgomery's writing and part in hers, but she signed it. In this application form, as Mr. Gearin told you, there are three different questions. One of them in this application form, the one that is of particular interest is this, and it is very small writing, and I am going to read it to you anyway:

"Have you had or have you ever been told you had or have you ever been treated for:

'Epilepsy, mental derangement, nervous prostra-

tion, syphilis, paralysis, convulsions, fainting spells?' "

Now, under "nervous prostration" you will find [8] from the evidence that there is a line drawn where they have drawn a line under nervous prostration, and after that they put the word "No." Down below they have put "Nervousness—2 yrs. ago, about 2 mos. duration; Complications, none." Then it asks for attending physician or healer: Dr. Joseph Cooney. The name was put down what he was attending physician for, Mrs. Montgomery and for their children.

Now, apparently, you have to be examined by a doctor when you are taking out a life insurance policy, and one of the names listed with the insurance company was Dr. McGee out at Hillsboro. Dr. McGee will be here to testify. He was the examiner of Mrs. Montgomery for this policy, and in that application—that is filled out by the doctor and sent to the company. Mrs. Montgomery apparently—well, you have been examined, they ask you questions, the doctor fills it in, and it is sent out.

The insurance company contends that Dr. and Mrs. Montgomery deliberately or falsely misrepresented and kept something from them. Dr. Dickel will testify, Dr. Dickel on behalf of the plaintiff, Dr. Montgomery. Dr. Dickel was one of the doctors called in this case, Dr. Coen, Dr. Dixon. Dr. Coen is not here. He is, I believe, in Kansas, if I am not mistaken, or in San Francisco.

There are two questions, mental derangement or [9] nervous prostration. That has been underlined.

It has been put in the application form. Dr. McGee will testify that he put it and wrote it in.

Mr. Gearin: Just a moment, your Honor, we object. This is not within the scope of the issues of the pretrial order. It is confined solely to that application that has been executed by the plaintiff and her husband in this case.

The Court: I am going to rule against you on that because that is the contention you made earlier, and I just read your contention, and it does not say that. You do not specifically limit it to the portion which she herself prepared. You were relying, as it says, "Defendant contends that the insurance policy was issued by the defendant solely in reliance upon false statements made by the said Anna Grace Montgomery and the plaintiff and not otherwise. That the representations made by the deceased and/or plaintiff were material, that they were not true and that the policy would not have been issued had the true facts been known." That is your complete statement.

Mr. Gearin: Yes, sir.

The Court: Go ahead.

Mr. Davis: This form the doctor filled in was sent back to the company. Now, the sole question, and I don't want to take up a great deal of time with you, ladies and gentlemen, but the doctors will testify, and the sole question [10] is this: Did Dr. Montgomery and did Mrs. Montgomery make false statements in order to get this policy. Did they conceal something with regard to this to keep the insurance company from giving that application to

them. I am not going to go into the medical testimony because you will hear the doctors and, as Mr. Gearin told you, keep an open mind until you have heard all of the evidence and Judge Solomon's instructions, and then bring in a fair verdict. That is all we can ask you to do.

I do want to point out this to you. One of the contentions was that Dr. Coen's name was never mentioned; Dr. Dickel's or Dr. Dixon's name was never mentioned, and in going through these exhibits when you examine them, here it says name and address of the attending physician and healer. Now, based upon that, the attending physician was Dr. Joseph Cooney. He is not a member—Dr. Joseph Cooney is an osteopath. Dr. Montgomery is a radiologist at the Portland Osteopathic Hospital. Dr. Cooney was not a member or on the staff of the hospital over at Holladay Park, and the records will show that Dr. Cooney as the attending physician called in Dr. Coen, Dr. Dickel, and Dr. Dixon as consultants to take care of her. He was not on the staff, and after this case is completely over, ladies and gentlemen, I want you to just consider one thing: Was there any element to keep this insurance company [11] (if there is any question about it) from finding out about this situation? That is all we want you to consider: Was this done falsely; was it done deliberately to mislead this insurance company. That is the whole question.

Mr. Gearin: We will offer into evidence, your Honor, Exhibit No. 1, the policy.

The Court: Received.

(Insurance policy previously marked Defendant's Exhibit 1 for identification was thereupon received in evidence.)

[See page 221.]

Mr. Gearin: May it be understood, your Honor, with regard to the written exhibits that are introduced that have been identified in the pretrial order that we may at any time refer to any part?

The Court: Yes, at any time. You do not have to read them to the jury at the time they are introduced. You can refer to them for the first time in the argument.

Mr. Gearin: May we ask then that there be received in evidence Exhibit No. 6-A, the record of Holladay Park Hospital.

The Court: All right, received.

(Document, record of Holladay Park Hospital, Anna Grace Montgomery, [12] previously marked Defendant's Exhibit 6-A for identification, was thereupon received in evidence.) [13]

HERMAN DICKEL

a witness produced in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Your name is Dr. Herman Dickel? A. It is.

Q. You are a psychiatrist, doctor?

A. I am.

Q. Are you regularly licensed to practice your

(Testimony of Herman Dickel.)

profession in this vicinity? A. I am.

Q. You are on the staffs of what hospitals?

A. Holladay Park Hospital, Emanuel, St. Vincent's and Good Samaritan.

Q. Do you restrict your work to the field of psychiatry? A. I do.

Q. Were you on the staff of Holladay Park Hospital in 1951? A. Yes, I was, sir.

Q. Doctor, is Holladay Park Hospital any particular kind of a hospital? Is it a psychiatric hospital or medical hospital, orthopedic hospital?

A. I think in this state it is licensed as a general hospital.

Q. What is the general work that they do? The bulk of [14] their work at the hospital is what, Doctor?

A. Oh, everything from medicine, surgery, obstetrics, gynecological things and psychiatric things. The second floor is restricted to psychiatric treatment problems, but the hospital as a whole is a general hospital.

Q. Doctor, in 1951, did you have——

The Court: I think probably you ought to find out and ask Dr. Dickel what is a psychiatrist.

Q. (By Mr. Gearin): What is a psychiatrist, Doctor?

A. A psychiatrist is a licensed physician and surgeon limiting his practice entirely to the treatment of those diseases which are more or less a part of the functioning of the central nervous system.

(Testimony of Herman Dickel.)

Q. Does that include mental derangement?

A. It might under certain circumstances.

Q. Doctor, in the spring of 1951, did you have occasion to treat Anna Grace Montgomery?

A. I would have to explain that in this manner. In 1951 the offices of Drs. Dixon, Dickel and Coen contained three of us as partners, and it was customary where any one of the three of us having cases in the hospital for the other two to occasionally look in and see or help out in such matters as were necessary. Actually, in this particular instance, Mrs. Montgomery was a case referred to Dr. Coen for consultation, advice and/or treatment, and on two [15] occasions, and only two occasions, when Dr. Coen was out of town and I made rounds at the hospital was it necessary for me to give any orders to the nurses in regard to her behalf. She was not actually under my care. She was under Dr. Coen's care.

Q. Doctor, when you saw her, was she confined to any hospital?

A. She was confined in Holladay Park Hospital.

Q. What floor of Holladay Park Hospital?

A. On the second floor.

Q. Was she a psychiatric patient?

A. Under the ordinary definition of the word, yes.

Q. Who was her attending physician at that time? A. Dr. Cooney, I think.

(Testimony of Herman Dickel.)

Q. Who was in charge of her care and treatment in Holladay Park Hospital?

A. Dr. Robert A. Coen, (spelling) C-o-e-n.

Q. What was his profession or calling at that time?

A. Dr. Coen was a licensed physician limiting his practice to psychiatry.

Q. Did you have occasion to see Mrs. Anna Grace Montgomery to such an extent that you could advise as to what her physical or mental condition was at the time she was confined in Holladay Park Hospital? A. No, I did not.

Mr. Gearin: No further questions, Doctor. [16]

Examination

Q. (By Mr. Davis): Dr. Dickel, where did you get your education, Doctor?

A. I graduated from the University of Montana from college, got my medical training at Northwestern University in Chicago. I interned at St. Vincent's Hospital in Portland and got my special training in psychiatry at the University of Oregon Medical School, the State Hopsital System in Nebraska, and Johns Hopkins University of Baltimore.

Q. How long have you been licensed in Oregon to practice your specialty, Doctor?

A. I have been licensed as a physician and surgeon since 1938.

The Court: Is this cross-examination?

Mr. Davis: Well, your Honor, allow me to say

(Testimony of Herman Dickel.)

this. I am going to ask Dr. Dickel to be my own witness in this matter, and I don't know as the Court will want me to have him come back or accomplish it at this time.

Mr. Gearin: I do not have any objection to his going outside of the realm of direct examination, your Honor.

The Court: All right, there is no question about Dr. Dickel's qualifications as a psychiatrist. That has been proved already.

Q. (By Mr. Davis): Dr. Dickel, in the field of psychiatry [17] it includes, as I believe you said, a number of things. Is that correct? A. Yes.

Q. Did you make any type of examinations of Mrs. Montgomery at the hospital or just visited with her?

A. So far as the records show it, and I have to depend entirely on the records, I only saw her very briefly on two occasions in order to help the nurses because Dr. Coen was out of town on those particular days. I do not recall doing any examination or any thorough study of her.

Q. The record that you have, Doctor, does that—is that Dr. Coen's record?

A. The records I have here are the records that were in our office and were left in our office by Dr. Coen when he left the city.

Q. In other words, is that, to your knowledge, a record of Dr. Coen's examination?

A. That's right, sir.

(Testimony of Herman Dickel.)

Q. You are familiar with that, aren't you, Doctor? A. I am.

Q. The three of you, Dr. Dixon, yourself, and Dr. Coen, acted together to do different work. Even though that patient may be under the supervision of one doctor, all three of you at that time would work with that patient, wouldn't you? [18]

A. At that time that is the way that we functioned, yes.

Q. Dr. Dickel, would you explain—as I understand, you mentioned Dr. Cooney was the attending physician; is that correct? Do your records show that?

A. That is what Dr. Coen has here, yes.

Q. As the attending physician? A. Yes.

Q. I believe you referred that Dr. Coen then would be a consultant?

A. He was called in for consultation, for examination, and for any treatment that seemed necessary so far as her psychiatric problems were concerned.

Q. At the Holladay Park Hospital Dr. Cooney was not on the staff? A. No, he was not.

Q. You knew that he was an osteopath?

A. Yes.

Mr. Davis: Your Honor, I wonder if the application form signed by Mrs. Anna Grace Montgomery, I believe that is an exhibit connected—it is the large form.

Mr. Gearin: It is the exhibit attached to the

(Testimony of Herman Dickel.)

deposition of Dr. Montgomery which is pretrial Exhibit No. 3.

The Court: It is not here. Dr. Montgomery, I have [19] his deposition, but it is not here.

Mr. Gearin: There it is, your Honor. That is it.

The Court: This is Dr. Lee. This is Pretrial Exhibit No. 1.

(Discussion between Court and counsel.)

Mr. Davis: This is right, your Honor. This is the one. May I have Dr. Dickel examine that?

(Document presented to the witness.)

Q. (By Mr. Davis): Dr. Dickel, you are holding an application form for the Bankers Union Life Insurance Company which was signed by Mrs. Montgomery, and I refer you to question 27: "Have you had or have you ever been told you had or have you ever been treated for"—do you see that, Doctor? A. Yes.

Q. Now, I refer you to (e), I believe it is, "Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells," all in that one (e). Now, Doctor, based upon the records that you have of Dr. Coen and based upon your knowledge of the case from the time that you knew about Mrs. Montgomery, could you advise the Court and jury, in your opinion, what, if any, of those should have been marked or underlined or answered to the affirmative?

Mr. Gearin: Objection, your Honor, on the grounds and for the reason that Dr. Dickel has told

(Testimony of Herman Dickel.)

us that he [20] cannot testify as to her mental and physical condition. The plaintiff has asked him to testify from the records, and the records are not in evidence.

The Court: What records?

Mr. Gearin: I do not think it is proper to ask a witness who has not sufficient knowledge of the deceased's mental or physical condition to give his opinion on it to say what answer should have been given when he does not have personal knowledge because he has been asked to testify from Dr. Coen's records. I would like to see Dr. Coen's records, those from which the doctor has been testifying, and I may want to offer them in evidence. Then, in that event, they would speak for themselves.

The Court: Yes, the jury is entitled to know the evidence upon which the doctor makes the determination. Do you desire to have the records in the office of Dr. Dickel made available and have the doctor testify on the basis of those records?

Mr. Davis: Now, if your Honor please, you have your records with you, haven't you, Doctor?

The Witness: Yes, I do.

Mr. Davis: I asked you to bring those. Is it necessary to refresh your memory from the records, or have you gone through your records in order that you can give an answer to the question? [21]

The Witness: I think I could give an answer to the question that you asked without referring further to the records.

(Testimony of Herman Dickel.)

The Court: That would not make any difference. I do not know where you get—you might have gotten it from the elevator boy or someone. I think we are entitled to know where you got your information about which you testify. If he is going to use the records, they should be in evidence, and if he is not going to use the records, then I do not see that he has any information upon which to base a judgment.

Q. (By Mr. Davis): Dr. Dickel, did you testify that these are records that you and Dr. Coen and Dr. Dixon maintained of Mrs. Montgomery?

A. The folder that I have here are the records that Dr. Coen maintained on Mrs. Montgomery while he had her under his care and at Holladay Park Hospital. Some of them are carbon copies of the hospital records. There are a few additions such as a newspaper clipping or two at the time of Mrs. Montgomery's death that were added subsequently simply because our office girls do that sort of thing, but, in the main, they are simply the records that were left by Dr. Coen.

Q. Doctor, are you in a position from your knowledge of this case to answer the question that I put to you, [22] within your knowledge? Let me ask you this, Doctor. In your opinion—I ask you to explain to the Court and jury what mental derangement in your field means.

A. Well, I can only give you an answer in terms of what I personally understand by it because it is a word, it is an expression, it is two words, an ex-

(Testimony of Herman Dickel.)

pression which is used rather loosely, and I don't believe has any common understood definition. Most psychiatrists, I think, would use the words "mental derangement" to refer to those serious organic diseases of the central nervous system, particularly of the brain, which alter the mental ability or the mental functioning, such as a brain tumor or epilepsy or some serious infection of the brain or anything that occurred as a result of trauma such as an automobile accident or a gunshot wound or something of that sort. Now, that is ordinarily the way that the expression is used.

Q. Doctor, in your opinion from your personal knowledge of the case, that is, of seeing Mrs. Montgomery, and the records that have been maintained and the hospital records, was Mrs. Montgomery suffering a mental derangement at the time of the hospitalization in March and April of 1951?

Mr. Gearin: Your Honor, I object to that on this ground: If the Doctor is testifying from refreshed memories, I would think that I ought to have an opportunity to see his [23] records, secondly, he would be testifying upon what Dr. Coen said, and Dr. Coen's deposition has already been taken, and it is marked. Now, that is my point, your Honor. It seems to me that one doctor cannot testify what another doctor put in his notes. I may not have any objection if I have been able to see the documents that the doctors used.

Mr. Davis: Your Honor, I think maybe better still we can give Dr. Dickel all of the hospital rec-

(Testimony of Herman Dickel.)

ords. I don't know if he has seen them or not, and they are part of the evidence, and give the doctor a chance to go over them if the Court so desires.

The Court: I do not desire anything. You are offering the evidence. I am just passing upon the objections.

Dr. Dickel has testified that he only saw her on two occasions, and your question calls for an examination of other things not before the Court. If you want to give him a hypothetical question including all the facts, this witness can answer it, but he is not going to answer a hypothetical question based upon information not before the Court and the jury.

Mr. Davis: Dr. Dickel, assume that in March of 1951 a woman twenty-nine years of age was admitted to the Holladay Park Hospital at the request of Dr. Cooney who was the attending physician and who requested the psychiatric [24] partnership of Dr. Coen and Dr. Dickel and Dr. Dixon to be called in as consultants; that she was in the hospital for two days in March and was thereafter brought back to the Holladay Hospital in April of 1951 where she was there for two weeks and that during the time that she was there this patient was given five shock treatments with the written consent of her husband and that there was a diagnosis or a tentative diagnosis, Doctor, that there was a slight, slight schizophrenic changes, a paranoid trend. After the two weeks' hospitalization she

(Testimony of Herman Dickel.)

went home and was in good health until October 14, 1954.

Doctor, in your opinion, was that patient suffering mental derangement?

A. Not in my own personal opinion, no; not as I had defined the way I would use the expression.

Q. The mental derangement, in your opinion, now, was that an opinion of yourself or in the medical field?

A. I can only give you what is generally regarded because, as I said, there is no specific definition of the expression mental derangement, but it is ordinarily reserved for those disturbances where a non-organic problem exists.

Q. Doctor, I used the words "slight schizophrenic changes, a paranoid trend." Would you explain to the Court and jury generally or briefly what that is meant in the field of [25] psychiatry?

Mr. Gearin: I am going to object, your Honor. The records that have been introduced in evidence show the final diagnosis of Dr. Robert A. Coen "schizophrenia, paranoid type." I would have no objection if he asked what that was.

Mr. Davis: Very well.

The Court: What was it?

Mr. Gearin: Schizophrenic, paranoid type.

The Court: The objection is overruled. You may answer the question. It does not make any difference whether it is mild or severe. Schizophrenia is schizophrenia, isn't it?

(Testimony of Herman Dickel.)

The Witness: I assume it is, Judge.

The Court: Yes, some of it is mild. Tell the jury what schizophrenia is, paranoid type.

The Witness: In the field of psychiatry we use an expression "schizophrenic reaction," meaning that this is a particular way an individual acted or behaved or functioned at a certain particular time in his life. Schizophrenia, as a word from its old Greek meaning, means splitting of personality. It is a word which is not very well understood because people have the feeling that it refers to a Dr. Jekyll and Mr. Hyde sort of business, which is not the way that the doctors look at it at all. The word actually from a medical point of view, means the condition in which [26] an individual physically may be entirely intact, functioning, living, going about with the rest of us in the same way that the rest of us do, but mentally and emotionally is at that moment not functioning the way that he should. In other words, there is a splitting between the physical aspects of the individual and the emotional or the mental aspects of the individual.

Perhaps a little example might clarify it for you. Under certain circumstances, a person coming to court, say, on a Monday, getting up in front of a group of attorneys and the jury, would physically and mentally and emotionally show some degree of distress which I am sure I can manifest at the present time. In other words, my mental, my emotional, my physical reactions are all essentially the

(Testimony of Herman Dickel.)

same. They are all functioning pretty much in keeping with the situation.

A schizophrenic individual might physically be here, but mentally, in order to answer the question, might laughingly talk about the Queen of the May or what happened on the Fourth of July in 1854 or might get up and dance around or some such thing like that; a rather obscure example, but I used the obscure one in order to show you that they may physically be in the same world we are, but mentally and emotionally at that time they wouldn't.

The word "schizophrenia," therefore, refers not to a specific disease like pneumonia or chicken pox but [27] rather to the way that the individual is reacting. Unfortunately, nobody at the present time knows what is the cause of schizophrenia. It has been assumed up until the last three or four years that schizophrenia was entirely a disturbance "from the ears on up," putting it in ordinary language. In the last three or four years certain very important discoveries have been made. One of these discoveries is that it is possible to take the blood of a schizophrenic patient and inject it into an entirely normal person and produce schizophrenic symptoms so for the first time in the history of medicine we are beginning to doubt that there is such a thing as a mental disease in the sense that it is all in one's imagination. Apparently, it begins to appear that certain physical changes or endocrine or glandular changes in the body at any give time can produce a disturbance

(Testimony of Herman Dickel.)

which we would call in psychiatry a schizophrenic reaction so that at the present time in using the word "schizophrenia" the doctor refers to a particular way a person is reacting.

Schizophrenia may be a permanent thing, as is evidenced by the number of people who are in the State Hospital over a period of many, many years. Schizophrenic reactions may be temporary, as little as two or three days, and the reason why some are permanent and some are temporary, again we doctors do not know. If it is proven that it is a [28] chemical sort of problem, then we will know because chemical things can vary.

The expression "paranoid" refers to a schizophrenic condition or a schizophrenic reaction in a patient where the individual is blaming other people for the things that are going wrong in him. Now, we are all inclined to do that sort of thing a little bit, and in a schizophrenic patient or a patient with schizophrenia, that blame is to a degree that is serious, serious enough for the doctors to wonder about it, serious enough for the doctors to so label it. Under ordinary circumstances, all schizophrenic people blame others a little bit, but where it is used as a part of the diagnosis it is to a point where it is somewhat more serious, a little more serious than under ordinary circumstances.

I think that I could go on a long, long time, but I think that is enough.

Q. (By Mr. Davis): Doctor, with regard to

(Testimony of Herman Dickel.)

the diagnosis of that nature, does that mean that it is a permanent illness?

A. No, a diagnosis of schizophrenia, paranoid type, or that type of reaction, as I said, might be one that would be completely permanent. On the other hand, it might be a very temporary sort of thing. The diagnosis or the labeling is put down simply to show what this person was going through at that particular time. [29]

Q. Doctor, with regard to women, and I would like to ask you a question about women that are to be, maybe to commence menopause or have had difficult troubles with any menstrual problems, do you find in your profession that you have this problem?

A. Yes, quite a large number of women who are either in the menopausal years or, as we doctors say, the premenopausal years, late thirties or early forties, quite frequently manifest this sort of reaction, some of them on a very temporary basis, some of them on a longer basis, some of them occasionally becoming chronic.

Doctor, I hand you the form up there. Would you explain what is meant by nervous prostration, that is, if they use it in the medical field.

A. Well, occasionally it is used in the medical field in the same way that the expression "combat fatigue" or "operational fatigue" or "combat exhaustion" or "operational exhaustion" is used. In other words, the nervous system, just the same as any other system of the body, may reach an exhaustive, may reach a fatigue level, and I would assume

(Testimony of Herman Dickel.)
that the word "prostration" would be likened to that.

Q. Doctor, do you recall the hypothetical question I asked you about the patient that was in the hospital two days in March and then she was there for two weeks and was [30] given five shock treatments and then was home until October of 1954, was in good health and was getting along fine. Doctor, in describing, if you were going to describe it—you have already said that was not mental derangement. Would it come closer, or could you say what would be the appropriate thing to underline or mark her trouble?

A. Are you asking me as a doctor if I were filling this out, or are you asking me if the patient were filling it out?

Q. The patient.

Mr. Gearin: Your Honor, that is not within the doctor's specialty and invades the province of the jury.

The Court: I think that is right.

Q. (By Mr. Davis): Between the two choices, if you had two choices, mental derangement or nervous prostration, what would you mark or underline, in your opinion?

A. Well, it would be——

Mr. Gearin: Just a moment please, Doctor. We object to that, your Honor, because that only singles out one small portion of the application, one of the questions being, "Have you ever consulted any

(Testimony of Herman Dickel.)

physician for any ailment, not included in the above?"

The Court: He is not talking about that particular section.

Mr. Gearin: I think he can ask if her condition was [31] one of mental derangement. He can ask if it was one of nervous prostration, but I do not think he is entitled to ask the doctor, "What would you put down there?"

Mr. Davis: If your Honor please, in the application form that I am referring to now it does not say treatment by any other doctors. That is not in this application form.

The Court: Are you trying to find out from the doctor what he would put down for himself, as an expert?

Mr. Davis: Yes, your Honor, if he were filling out this application form and he had a chance to underline, what would he do, what would come closer to notifying the company what it was, your Honor.

Mr. Gearin: We object on the further ground, object to that way, your Honor, the question must be answered yes or no. I add that to my objection heretofore made.

The Court: He can put that in.

Mr. Davis: May I rephrase the question to this extent, your Honor?

The Court: All right.

Q. (By Mr. Davis): What would be the closest,

(Testimony of Herman Dickel.)

between the two, Dr. Dickel, that would underline this condition that I have described to you in my hypothetical question?

Mr. Gearin: Same objection, your Honor.

The Court: I am going to let the doctor testify. This is not what a layman would do, but this [32] would be a psychiatrist if he were filling out the application for himself if he were applying for insurance. Go ahead.

The Witness: First of all, I would have to state this, that I would have to know the diagnosis.

Mr. Davis: Well, I believe in my hypothetical question, Doctor, that I did mention to you that diagnosis had been made in the hospital records of schizophrenic, paranoid.

A. Yes, but am I as a patient supposed to know that I had the diagnosis?

The Court: The question does not involve the patient. The question involves what you would do if you were an applicant and you were given this application.

Q. (By Mr. Davis): I limit it to the two things, Doctor. It says mental derangement or nervous prostration, based upon the hypothetical question that I gave you.

A. Well, personally, I don't think I could answer that question for the simple reason that if as a specialist filling it out on myself I would have to assume that I had had the disease, and the only way I would know that I had the disease is if

(Testimony of Herman Dickel.)

somebody made it because I couldn't make it on myself so I would have to know that some other person had made it on me.

If I had been told that I had had this disease, if I was filling this out with the full knowledge that I had had this label, this disease placed on me, then I think [33] I would put probably nervous prostration because from what I have already said, to me mental derangement would refer to an organic disease.

Q. Dr. Dickel, with regard to shock treatment, would you tell the Court and jury what shock treatment is? Is it limited solely to people that are of nervous condition or are in mental stress? Would you explain generally what shock treatment is and what do they do it for?

A. Electric shock treatment or electric shock therapy, as the expression is sometimes called, is the utilization of a highly regulated, highly refined electric current for the production of unconsciousness just exactly the same way as ether or some other chemicals will produce an unconscious condition. Contrary to public belief, electricity is not used to shock people in the sense that the words to scare or startle them is used. It rather very smoothly and very nicely produces a state of unconsciousness. The depth of that unconsciousness can be completely controlled by the electric current. If the state of unconsciousness is very mild, you would hardly use the word "shock." If the state

(Testimony of Herman Dickel.)

of unconsciousness is rather profound or very deep as such sometimes occurs in a surgical operation with ether, then it is called a state of shock. A state of shock, therefore, in electric therapy, the state of unconsciousness produced by using [34] electric current, why it works in a variety of illnesses, nobody really knows, but it is used for a wide assortment of things in the field of psychiatry all the way in some instances from the very seriously mentally ill people in hospitals to the very mild sort of emotional or mental upsets that in some parts of the country would be treated not in hospitals but office practice.

As a matter of fact, more recently, because of refinements in the use of electricity, instead of being called shock it is now called electric stimulation, and electric stimulation is actually used for the treatment of such things as migraine headaches in some instances.

Q. Dr. Dickel, with regard—you made the statement that your patients, and is it within your practice, do you explain to a patient what your diagnosis is? Do you tell them that, generally?

Mr. Gearin: We will object to that, your Honor, unless——

The Court: Objection sustained.

Q. (By Mr. Davis): What is meant by a diagnosis? Would you explain that, Doctor?

A. Well, the diagnosis is the name of a disease or a condition or a disturbance that the doctor is

(Testimony of Herman Dickel.)

placing on a particular problem that a patient who he had had under his care has had. In other words, it is a label that the [35] doctor uses to designate what a person has wrong with him.

Q. Is that something definite within your field, Doctor?

A. As I stated before, in the field of psychiatry the diagnosis refers to the manner in which an individual is functioning or behaving at a given time. It is not necessary to refer to a specific disease of a specific organ of the body such as pneumonia would or whooping cough or appendicitis.

Mr. Davis: That is all.

Cross Examination

Q. (By Mr. Gearin): Doctor, did you discuss Mrs. Montgomery's condition with Dr. Montgomery, her husband? A. At what time?

Q. Prior to, say, well, during the time she was in the hospital on two occasions.

A. I don't recall ever doing it.

Q. Did she know that she was in Holladay Park Hospital?

A. I could not answer that either yes or no. I don't know.

Q. On the second floor of Holladay Park Hospital, is it not true, Doctor, the doors are locked?

A. They were at that time, yes.

Q. The patients cannot get in or out?

A. They were at that time.

(Testimony of Herman Dickel.)

Q. Does shock treatment cause convulsions?

A. It would depend entirely upon the manner in which the [36] individual gave it, I mean the individual doctor gave it. It could.

Q. Would you say that schizophrenia, paranoid type, was a mental illness?

A. Yes, I would say that.

Q. Would you say that in the layman's language, Doctor, that schizophrenia, paranoid type, was a mental derangement?

A. I think it would depend entirely upon the manner in which the individual used the expression. It possibly could.

Q. Doctor, you have reference to Dr. Coen's notes to refresh your memory, have you not?

A. Yes.

Q. May I ask, your Honor, that the bailiff obtain them and hand them over to me, please, so that I may see them?

(Document presented to counsel.)

Q. (By Mr. Gearin): Doctor, who was Frank Jacobson?

A. He was at that time a clinical psychologist who was attending the University of Oregon Medical School and did psychological tests on some of our patients at the office and at the hospital.

Q. You corresponded with Dr. Coen about the matter of prospective litigation arising out of the death of Mrs. Montgomery, did you? A. Yes.

Mr. Gearin: Your Honor, I would like to offer

(Testimony of Herman Dickel.)

that [37] portion of the file of Dr. Montgomery subsequent to the date of application, that is, October 13, 1954.

The Court: Dr. Montgomery?

Mr. Gearin: I mean, excuse me, Dr. Coen, the records from which Dr. Dickel has been testifying.

The Court: I do not think that anything he has said referred to any of the files. He merely testified that he saw her on two occasions. He does not remember anything, except what he saw, about the case. All the rest of it has been given on the basis of hypothetical questions so I do not think there is any portion of the file that is admissible.

Mr. Gearin: May I have it marked?

The Court: (To Mr. Davis) Do you want it?

Mr. Davis: No, your Honor, I have never seen it, and I was limited based upon objections, your Honor, and I had to ask my questions hypothetically.

The Court: I offered to permit you to do it.

Mr. Davis: I know you did, your Honor. I know it.

The Court: You do not want it in?

Mr. Davis: No, sir.

The Court: The objection is sustained. If you want it in, it goes in. If you don't want it in, I will sustain the objection.

Mr. Gearin: I have no further questions, Doctor. [38] Thank you.

The Court: Are there any further questions?

Mr. Davis: No, your Honor.

The Court: Ladies and gentlemen, Dr. Dickel has now testified for both parties. Is he excused from further attendance at the trial?

Mr. Gearin: Yes, sir.

Mr. Davis: Yes, sir.

Mr. Gearin: I wonder, your Honor, if Dr. Cooney is in the courtroom. [39]

(Witness excused.)

JOSEPH A. COONEY

called as a witness in the above-entitled cause, having been first duly sworn, was examined and testi- as follows:

Examination

Q. (By Mr. Gearin): Dr. Cooney, what is your occupation or profession?

A. I am an osteopathic physician and surgeon.

Q. Do you deal in the field of psychiatry?

A. No.

Q. Are you on the staff of Holladay Park Hospital? A. No.

Q. Did you treat Mrs. Montgomery in the early spring of 1951? A. Yes.

Q. That is Anna Grace Montgomery?

A. Anna Grace Montgomery.

Mr. Davis: Dr. Cooney, I think you will have to speak up a little louder. I cannot hear you.

The Witness: I am sorry.

Q. (By Mr. Gearin): Did you treat her prior

(Testimony of Joseph A. Cooney.)

to the time that she was confined to the Holladay Park Hospital? A. Yes.

Q. Did you recommend that she seek psychiatric treatment?

A. Yes, I referred her to Holladay Park. [40]

Q. Was she confined to the Holladay Park Hospital more than once?

A. I couldn't answer that question.

Q. I understand, Doctor, that you were sick yourself that spring?

A. I was ill at that time.

Q. Were you engaged in practice through the spring, or were you out of practice for a considerable period of time? A. At which year now?

Q. I didn't hear the answer.

A. In what year?

Q. 1951. A. No, I was engaged full time.

Q. Did you know anything about her—at the time did you know that she went back to Holladay Park Hospital for a period of two weeks?

A. Do you mean did I know it professionally or as a matter of hearsay?

Q. Well, professionally, let's say.

A. No, I did not attend her professionally at that time.

Q. When she was confined to Holladay Park Hospital, did you discuss her condition with her husband, Dr. Montgomery? A. Yes.

Q. What is the fact, Doctor, as to whether or not you and Dr. Montgomery had an understanding

(Testimony of Joseph A. Cooney.)

that you did not discuss [41] with Mrs. Montgomery her mental illness?

Mr. Davis: If your Honor please, may I ask just one question? Is this an adverse witness, or is this—it is a leading question. That is the reason I asked.

Mr. Gearin: I asked him what the fact was, your Honor. I will withdraw the question.

Q. Was there an understanding, Dr. Cooney, between you and Mr. Montgomery—excuse me, between you and Dr. Montgomery—that Mrs. Montgomery's mental illness would not be discussed with her or in her presence?

A. May I ask that you clarify the word "understanding"? May I ask that you clarify the meaning of your word "understanding"?

Q. Did you understand my question, Doctor?

The Court: He does not understand the word "understanding."

The Witness: I don't know your use of it.

The Court: Did you have an agreement, or did you talk it over with Dr. Montgomery?

The Witness: We had no agreement other than you would talk over such things amongst yourselves.

Q. (By Mr. Gearin): Between you and Dr. Montgomery?

A. I am afraid I am a little bewildered. We talked it over in a friendly manner just as you would talk over anything like that with one of your friends.

(Testimony of Joseph A. Cooney.)

Q. That's right, and the subject of that [42] conversation, among other things, was her mental illness?

A. I have always been under the impression that it was not strictly a mental illness. Of course, that is out of my field.

Q. Was the subject of her mental illness discussed between you and Dr. Montgomery?

A. The subject of her illness was discussed between myself and him.

Mr. Gearin: I have no further questions.

Mr. Davis: This will be the same unless your Honor would like to have me bring him back this afternoon.

Mr. Gearin: That is all, right, your Honor.

The Court: All right, go ahead.

Examination

Q. (By Mr. Davis): Dr. Cooney, you had been the doctor for Mrs. Montgomery for some period of time; had you not? A. Yes.

Q. You had taken care of Dr. Montgomery and Mrs. Montgomery's children?

A. That's right.

Q. Where did you maintain your office at that time? A. In Oswego.

Q. Pardon? A. In Oswego. [43]

Q. On occasions were there things that you had taken care of as to Mrs. Montgomery's health? I mean, had you generally been the doctor for her?

(Testimony of Joseph A. Cooney.)

A. I had generally been advising with her about her health, and occasionally I would give her medication for the symptoms.

Q. She had had some type of woman—or suspension of uterus operation, hadn't she, Doctor?

A. That is true, yes.

Q. Do you recall when that was?

A. It was in the spring of 1951, I am quite sure.

Q. Did you call in a specialist to handle that for you?

A. I called in a surgeon to take care of the suspension.

Q. Doctor, would you explain to the Court and jury why, in your opinion, you felt that you should call in a specialist, a psychiatric specialist, and give generally the background?

A. On the day when it first became apparent that she was having a little disturbance——

The Court: Could you speak a little louder?

The Witness: On the day that it first became apparent that she was having emotional disturbance that I couldn't handle——

The Court: This is a suggestion. If you would look at the jury rather than looking at me, your voice would carry a little better. [44]

The Witness: On the day when she suffered an emotional disturbance that I couldn't take care of she was, oh, unreasoning, no one could reason with her, so I called in a specialist in that field.

Q. (By Mr. Davis): Doctor, what is your field, specialty, what particular field?

(Testimony of Joseph A. Cooney.)

A. Internal medicine.

Q. Internal medicine is what?

A. Diagnosis and treatment of diseases of the internal organs other than genitourinary.

Q. I am sure the jury can't hear you. I can't hear you.

A. It's diseases of the internal organs other than those of the genitourinary tract.

Q. Dr. Cooney, you were personally acquainted with Dr. Montgomery and Mrs. Montgomery; were you not?

A. I was personally acquainted with them.

Q. You went to school with Dr. Montgomery back East? A. Yes.

Q. What was her condition prior to the time you brought in a specialist?

A. To me it was that of a normal woman.

Q. Was she having any problems with her female organs? A. Oh, yes.

Q. Would you explain it to the jury?

A. Well, she would periodically suffer difficult menstruation. [45] She said it was scanty, which worried her. There was always a feeling of weight. She had had two children. There was always a feeling of weight in the pelvis.

The Court: Of weight?

The Witness: Weight, and there was a constant, you might call it drag on her resources because of that feeling, and a consequent nervousness and irritability associated with it.

Q. (By Mr. Davis): Now, you do not profess

(Testimony of Joseph A. Cooney.)

to be a specialist in the field of psychiatry, do you, Doctor? A. No.

Q. You are not attached to the Holladay Park Hospital staff? A. No.

Q. After she was out of the hospital the second time in April of 1951, did you observe her condition?

A. Yes, it was a sort of professional and social combined observation.

Q. Could you tell the Court and jury what her physical condition—was she depressed prior to this time?

A. During her depressed stage, you could almost diagnose that it was approaching the time of the menses. During those times that she was depressed you would naturally assume that she was getting near her period time. Do I make myself clear?

Q. Yes, I am trying to ask you this whether, being the [46] attending physician, did you reach a tentative diagnosis yourself why you called in a specialist?

A. I am ashamed to say, but I think she made the diagnosis herself when she told me that she had had two sisters who had gone through an early menopausal syndrome at early ages. She herself had not begun to menstruate until late in life comparatively, and those people who do that have an earlier menopause than a woman who begins normally at twelve to fourteen years.

Q. Doctor, in the course of your profession, you

(Testimony of Joseph A. Cooney.)

have observed people, have observed people that are mentally deranged?

A. In my particular field we must assume that any so-called mental disease has a physical background. I cannot explain it any better than that. We always look for the physical background of any mental disease.

Q. In your opinion, and you were the attending physician, was this a question of a mental breakdown or a nervous breakdown or a nervous condition or what?

A. You would call it a nervous breakdown if you were trying to explain it to anyone other than a man in the field of psychiatry.

Q. I broke in on you, but after she came out of the hospital, for the two weeks at the Holladay, did she come back to you again for any type of treatments or anything? [47]

A. From time to time, yes. I might clarify that a little bit in that she never particularly came in for herself alone. It was always in the discussion of one of the children whom she would bring to me for shots and consultation, and in the course of the conversation she would bring out her own problems.

Q. You said that you were the one that called in Dr. Coen when you felt you couldn't handle the situation? A. That is right.

Q. What was her recovery after that, Doctor?

A. Remarkable, I thought. After two or three

(Testimony of Joseph A. Cooney.)

days in the hospital she seemed to respond quite well.

Q. Now, you had a heart attack when, sir?

A. 1953, November.

Q. And after that time you were out of the practice for some length of time?

A. That's right.

Q. Where are you practicing now, Doctor?

A. In Sandy, Oregon.

Q. Sandy, Oregon. I think that is all.

Cross Examination

Q. (By Mr. Gearin): After your 1953 coronary attack, who was her attending physician; do you know?

A. Yes, Dr. Burke who took over my practice when I had to [48] leave it.

Q. (Spelling) B-u-r-k-e?

A. (Spelling) B-u-r-k-e, yes.

Mr. Gearin: Now, your Honor, may I understand that this is cross examination?

The Court: Yes.

Q. (By Mr. Gearin): Doctor, subsequently, you came to an independent conclusion that she had a psychiatric problem, schizophrenia, paranoid type; did you not?

A. I cannot honestly say that I agreed with the psychiatric diagnosis.

Q. Did you subsequently after the hospitalization—— A. You mean agree with it?

Q. Yes.

(Testimony of Joseph A. Cooney.)

A. No, but there was nothing else I could do.

Q. When you saw her, she had been in a state of severe depression, had she?

A. No, when I saw her she was emotionally upset.

Q. I am sorry. I didn't hear your answer. Was your answer that she was or was not in a state of severe depression?

A. She was emotionally upset. She was not depressed, no.

Q. Was she ever withdrawn?

A. To my knowledge, I have never seen her that way.

Mr. Gearin: Page 23 of the deposition, your Honor. [49]

The Court: Doctor, do you remember when your deposition was taken by Mr. Hilliard?

The Witness: Yes.

The Court: All right, ask him the questions.

Q. (By Mr. Gearin): Do you recall at that time you gave this answer to this question:

"Q. Did you ever see her in moods of severe depression? A. Yes."

Q. Did you so testify?

A. I did so testify.

Q. "Q. Would you say that her moods of depression were quite severe and caused her to become withdrawn?

"A. I have never seen her in a withdrawn state except one time prior to the date of the first admission to Holladay Park."

(Testimony of Joseph A. Cooney.)

Did you so testify?

A. I did so testify. That was the day of the admission in which I explained she was emotionally upset.

Q. Prior to the time of her first admission, Doctor, was she irrational?

A. She was irrational at the time I saw her before [50] admission, and I had seen her for about an hour before she was admitted.

Q. What was her attitude as to being out of the ordinary or not?

The Court: I do not know what that means.

The Witness: I don't either.

Mr. Gearin: I will withdraw the question.

The Court: Perhaps the Doctor knows?

The Witness: No, I am sorry, I don't know. Could you rephrase it?

The Court: That is a question that was asked you before which you apparently answered.

Mr. Gearin: Page 19 of the deposition, please. I will ask you, at the time of your deposition, Doctor, if you were asked this question and you gave this answer.

The Court: I do not see how you can impeach him with something he does not know the answer to now.

Mr. Gearin: Your Honor, the answer contains words, and they were his own words at the time. That was his answer, your Honor. I think under the circumstances I ought to ask him if he made that answer.

(Testimony of Joseph A. Cooney.)

Q. Did she know what she was there for?

A. I can't answer that. I don't know.

Q. She was worried about a couple of sisters that had had some disturbance, wasn't she?

A. Her sisters had undergone early menopausal symptoms.

Q. The same way that she had; do you know?

A. I don't know, no.

Q. Did she discuss that with you?

A. No, she would discuss occasionally her sister when she got a letter from her.

Q. Doctor, we discussed this before. I would like to discuss it with you once again.

Did you ever reach an independent conclusion that Mrs. Montgomery was possibly a schizophrenic personality?

Mr. Davis: If your Honor please, I think that should be limited in scope and time or up to the time of this application or something of that nature. I believe the question should be limited and not leave it wide open.

The Court: All right, prior to the date of the application.

Q. (By Mr. Gearin): Well, say prior to 1953, did you come to that conclusion yourself?

A. I would be unable to come to such a diagnosis in my field.

Q. Will you refer, please, to page 53 of your deposition, [54] the first question.

The Court: Read it.

Mr. Gearin: (Reading) "Q. I realize, of

(Testimony of Joseph A. Cooney.)
course, that this is outside your particular specialty, but did you reach the independent conclusion that she was possibly a schizophrenic personality?

"A. Oh, yes; later.

"Q. Do you remember approximately what year it was when you first reached that conclusion?

"A. I disputed the psychiatrist for about two years, until about her third admission.

"Q. Would that be in 1952 or '53?

A. About '53 or '54."

Q. Did you so testify?

A. I did so testify. Here again, I want it understood that any conclusion I had regarding the psychiatric problems would be told to me and that the conclusion would not be my own.

Q. Well now, didn't you discuss with Dr. Montgomery the feeling that you had that she was possibly a schizophrenic personality?

A. I would discuss with Dr. Montgomery the treatment and symptoms of schizophrenia. I do not recall whether it was specifically about her case. I mean, it was in a [55] general field.

Q. Did he make any statements to you that he knew that she was possibly a schizophrenic personality?

A. If he did, it was because the psychiatrists had given him that diagnosis. I would have to accept that diagnosis.

Q. All right then, you and he discussed a diagnosis of her being a schizophrenic personality?

(Testimony of Joseph A. Cooney.)

A. Yes.

Mr. Gearin: Thank you, Doctor, I have no further questions.

Mr. Davis: Your Honor, I have one question that I didn't ask.

Q. Dr. Cooney, did the Bankers Union Life Insurance Company ever contact you in 1954 or 1955 or 1956 or up to the present time with regard to an application of insurance taken out by Mrs. Montgomery? A. No.

Mr. Davis: That is all.

Q. (By Mr. Gearin): Your deposition was taken by us in January of this year; was it not?

A. 1957, yes.

Mr. Gearin: I have no further questions.

The Court: That is all.

(Witness excused.)

The Court: Ladies and gentlemen, we are now going to [56] take a recess until two o'clock. Please do not make up your minds as to how this case should be determined until you have heard all the evidence, the arguments of counsel, and the instructions of the Court. Likewise, please do not discuss this case with anyone, even among yourselves, until the case is submitted to you. You are now excused until two o'clock.

(Thereupon, at 12:15 noon the jury retired for the noon recess, and the jury having retired, the following proceedings were had:)

(Discussion between Court and counsel off the record.)

Mr. Gearin: I don't know which way to turn right now. I don't know which way they are going, and that is the reason that I am perhaps stating no position. I still don't know what they are trying to do to me. This is all new.

The Court: Dr. McGee is an osteopath, as I understand it, and he was acquainted with Mrs. Montgomery and Dr. Montgomery, knew that she had been in the Holladay Park Hospital, and what else are you going to say, that he went through this question for the examining physician to make out, and then what?

Mr. Davis: Well, your Honor, I am not here, your Honor, to conceal anything. [57]

The Court: The point is this: You said a minute ago that you were not going to rely on waiver, and I do not understand what knowledge Dr. McGee would have to add unless you do rely on waiver.

Mr. Davis: Your Honor, could I see the second form up there, the application?

The Court: I think you have it, don't you?

Mr. Davis: No, sir, I do not want Mrs. Montgomery's application, but I want Dr. McGee's form. As I explained to the Court before, on this application form that Mrs. Montgomery filled out we do not feel there was any misrepresentation or any hiding of anything. Then apparently on Dr. Lee's deposition that I didn't read until last week this form comes out, and this is what the doctor filled out. Mrs. Montgomery didn't have anything to do with this except to answer questions.

Mr. Gearin: Well, then, what materiality is it?

The Court: Just a minute. Go ahead.

Mr. Davis: When the Doctor asked her the questions, Dr. McGee is going to testify that he has made out many of these for this insurance company, and the one that they are relying on that Mr. Gearin talks about, did you go to any other doctor for treatments for the different diseases, Dr. McGee is going to testify with regard to that and what his practice has been. [58]

Now, in this form, for instance, your Honor, it says, "Have you ever had undergone any surgical operation? Yes, suspension uterus, three years ago in February, Dr. Ira Neher." This was filled out. "Have you consulted or been treated by any physician for any ailment or disease not included in your above answers?" Now, there was the word "No"; then they wrote in the word "Yes," and then it says, "Dr. Joe Cooney," and it says, "Excellent." The words "Yes" and "Dr. Cooney." Now, your Honor, Dr. McGee is going to testify this, that he knew that there were other doctors at the hospital.

The Court: What hospital?

Mr. Davis: At the Holladay Hospital. He is going to testify that Dr. Joe Cooney was the attending physician for her. He knew that.

Mr. Gearin: That is on the application. We don't raise any point on that.

Mr. Davis: But, you see, based upon the cases, and I didn't mean to be disrespectful about it, but all the application form says, it says attending physician. It does not ask for any hospitalization. It does not ask for anything.

The Court: We will submit it on the issues framed by the pretrial order, but I cannot determine the impact of the testimony until I hear the testimony, and that is all [59] I am going to say. Where is the original?

Mr. Gearin: The original is back to the company. We had agreed that this may be used.

(Noon recess taken.) [60]

Afternoon Session, 2:00 p.m., Trial Resumed

The Court: Call your next witness.

Mr. Gearin: We will call Dr. Montgomery as an adverse party, your Honor.

JOHN L. MONTGOMERY

plaintiff, called as adverse party in behalf of defendant, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Gearin): Your name is John Lyle Montgomery, and you are plaintiff in this case?

A. Yes.

Q. You are an osteopathic physician and surgeon? A. Correct.

Q. How long have you followed your profession, Doctor?

A. I graduated from college in 1941, following which I interned for one year in the City of Detroit, and thereafter I practiced about two years in general practice and returned to take a specialty training and a residency in radiology, which is

(Testimony of John L. Montgomery.)

X-ray specialist, and I have practiced since that time in that specialty.

Q. Doctor, when did you and Mrs. Montgomery receive the policy that was issued upon her life?

A. As I recall, I believe that was issued in, I think, in 1954. I am not sure about that. [61]

Q. Calling your attention to the date of October 13th, is that the approximate date when the application was made or signed or executed?

A. I think that is correct.

Q. How soon after that did you receive the policy?

A. I don't recall exactly; probably a matter of a couple of weeks.

Q. In 1951, in March, did Mrs. Montgomery have occasion to go to the Holladay Park Hospital?

A. Yes.

Q. How did she get there?

A. She went to the hospital by ambulance.

Q. Did you accompany her?

A. I followed.

Q. How long did she stay in Holladay Park Hospital?

A. Just a couple of days, a short time.

Q. Did she thereafter return to Holladay Park Hospital? A. Yes.

Q. At either times, either time when she was admitted to the hospital, did you give your consent to electric shock therapy?

A. Yes, when any patient enters a hospital, it is

(Testimony of John L. Montgomery.)

necessary to sign forms such as surgical permits, and I signed all the forms necessary.

Q. In what ward of the hospital was she? [62]

A. Pardon?

Q. In what ward or part of the hospital was she? A. She was on the second floor.

Q. Is that a psychiatric ward? A. Yes.

Q. Did you see her daily?

A. I don't recall that I went every day, but I went many days.

Q. Were the doors and corridors locked and you had to get a nurse with a key to let you in and let you out? A. Yes.

Q. Did she know where she was at the time that she was confined to Holladay Park Hospital?

A. Yes.

Q. Did you ever discuss her condition with Dr. Coen? A. We discussed her condition.

Q. The application that was given to you by the agent in this case, will you tell us briefly how that was executed?

A. I don't recall if the agent brought the forms to my office or if he mailed them. I would presume that he gave them to us in person. Then I would have taken the forms home, and, as I recall, we sat and discussed the questionnaire at home, filling it out at home.

Q. Did Mrs. Montgomery sign it?

A. Yes. [63]

Q. Did you go over the answers with her?

A. I again do not recall if I sat down immedi-

(Testimony of John L. Montgomery.)

ately afterwards and surveyed the answers or whether we discussed it across the table from one another after supper.

Q. Either one or the other? A. Yes.

Q. I was wondering, your Honor, if we could have the Exhibit No. 1, Deposition Exhibit No. 1, the application.

Doctor, did you ever live in Beaverton?

A. Yes.

Q. Was your address 616 Northwest 18th Street?

A. No, it was 4100 Southwest 109th.

Q. Do you know what 616 Northwest 18th in Beaverton was?

A. No, I know of no such address in Beaverton.

Q. You have been handed a document by the courtesy of the bailiff. Is that the application that you told us about that you took home?

A. Yes.

Mr. Gearin: We ask that that be received, your Honor.

The Court: Is it on the original policy, anyway?

Mr. Gearin: Yes, it is, but this is much larger, your Honor. The other one has been reduced.

Mr. Davis: We have no objection.

The Court: Admitted.

Mr. Gearin: I think this should be No. 3-A.

(Photostat of application form No. 59797, October 13, 1954, was thereupon marked Defendant's Exhibit 3-A for identification and received in evidence.)

(Testimony of John L. Montgomery.)

[Note: Exhibit 3-A—Application Form No. 59797 is the same as the Application Form included in Defendant's Exhibit 1 set out at page 227 of this printed record.]

Mr. Gearin: No further questions, Doctor, thank you.

Mr. Davis: Your Honor, we can wait.

The Court: All right.

Mr. Davis: That will be all.

(Witness temporarily excused.)

Mr. Gearin: We would like to read to the jury, your Honor, the deposition of Dr. Coen.

The Court: Ladies and gentlemen, I think you have seen this done before. Mr. Burns will act as Dr. Coen. In fact, he will be all the witnesses whose depositions are going to be read. This is a deposition. It is called a deposition de bene esse which is something a little different than the depositions that were taken for discovery purposes. Dr. Coen was down in California at the time that this deposition was taken, and he could not come to this trial; therefore, his testimony was taken under courtroom conditions, that is, before he testified he raised his hand and swore to tell the truth. He was interrogated by an attorney for the defendant and then cross examined by an attorney representing the plaintiff. In other words, the testimony of Dr. Coen was taken as nearly as it would be [65] taken had he appeared in person. You are to give it such weight as you think it deserves, using the same rules that I will lay down for you at the end of

this case for the evaluation of the testimony of witnesses. Proceed.

(Thereupon, the deposition of Dr. Robert A. Coen, taken April 8, 1957, in Berkeley, California, was read into the record as follows:

DEPOSITION OF DR. ROBERT A. COEN

"Q. Would you state your full name, for the record, please?

A. Robert A. Coen,—C-o-e-n.

Q. You are a doctor? A. Yes, sir.

Q. Do you have a specialty, Doctor?

A. Yes, I have.

Q. Would you tell us what that is?

A. Psychiatry.

Q. Where did you receive your medical training?

A. At the University of Oregon Medical School.

Q. What year was that?

A. 1934 to 1938.

Q. Would you tell us any other courses you have taken, studies, in connection with your profession?

A. I had two years of psychiatric residency at the Hastings State Hospital in Nebraska and one year which was accepted for training in the Medical Corps of the Army. [66]

Q. You practiced in Portland for a length of time? A. Yes.

Q. What office or doctors were you associated with in Portland?

(Deposition of Dr. Robert A. Coen.)

A. From 1946 until 1951 I was associated with Dr. Dixon—D-i-x-o-n, and Dr. Dickel.

Q. After that where did you go?

A. I had my own office until 1953; that was also in Portland. Since that time I have been taking research training.

Q. What is the nature of the research training that you are doing now, or is that general?

A. That is right. They are basic techniques so I can do research in psychiatry.

Q. Then I understand you are going to Nebraska after you leave here? A. Yes.

Q. Where are you going?

A. I am going to be the clinical director at the Hastings Hospital, Ingleside, Nebraska.

Q. In the future months, if we want to get in touch with you, that would be the place to do it?

A. I will be there.

Q. When you were in Portland did you have occasion to treat Anna Grace Montgomery?

A. I did. [67]

Q. Could you tell us under what circumstances and when you first treated her? You may use those hospital records, photostatic copies you have in your hand, to refresh your memory.

Those have been identified as an exhibit in the trial of this case to another deposition.

A. I saw her first as a patient at Holladay Park Hospital in March of 1951. To be perfectly accurate, I could conceivably have seen her in the office prior to that time but I don't think so.

(Deposition of Dr. Robert A. Coen.)

Q. That wouldn't show of course here. You don't have your own records with you, is that right?

A. No, I haven't. Dr. Dickel has them.

Q. They would be retained in the Portland office of Dr. Dickel? A. Yes.

Q. Would you just continue on with this, Doctor, and tell us what you saw her for and what her condition was?

A. I saw her with regard to the fact that she presented certain personality symptoms. She was admitted to the hospital for observation, and if required, treatment.

Her first period of hospitalization, which terminated March 10, 1951, turned out to be only for examination and observation.

However, she was later readmitted to the same hospital, again to the psychiatric ward, on April 9, 1951. [68] She then was given five electro-shock treatments. She was discharged April 22, 1951, to her husband.

Q. Is that the last occasion that you saw her, to the best of your recollection?

A. To the best of my recollection, yes.

Q. At least, as far as shown by the hospital records? A. That is true.

Q. How could you describe her condition in terms that a layman would understand?

A. She presented three things: One, a looseness of association by which is meant that her ideals did not hang together;

(Deposition of Dr. Robert A. Coen.)

Second, she presented ideals of references. This term is used to indicate people who feel that events or statements are meant for them; and

Third, she presented delusions of persecution. She felt that others were deliberately causing her trouble.

Q. That is the complete picture then, as shown to you?

A. It isn't complete from a technical standpoint, for there is usually an emotional disturbance that accompanies this, but in her case, I believe, there was some variation that would be a long sort of a discussion to describe the variations.

Q. Would it be something significant to us, do you think, Doctor?

A. I don't think so. [69]

Q. Did she have a history that you knew of of menopausal disturbances? I realize I am taxing your recollection on this, Doctor?

A. Not to my knowledge; not to my recollection, perhaps I should say.

Q. How many times did you see her, Doctor?

A. When she was in the hospital I saw her daily except for the times that she was seen by Dr. Dickel.

Q. Did he actively participate in the course of treatment at that time or were you handling the situation?

A. I have to say that since she had been referred to him, that he actively participated.

(Deposition of Dr. Robert A. Coen.)

Q. How many days, approximately, was she in the hospital for those two treatments?

A. You mean during those two admissions?

Q. The two admissions that you have testified on. A. Approximately eighteen.

Q. You were seeing her daily during that time, I take it?

A. With the few exceptions, on days when she was seen by Dr. Dickel.

Q. Would you tell us what your medical diagnosis was for her condition?

A. I called her on each admission—let me put it this way, if I may: Her diagnosis on each occasion that I made was schizophrenia, paranoid type. [70]

Q. I know I am asking you to do something that you might not think is completely technically accurate, but could you tell us briefly, for the record, what type of personality that involves?

A. Do you want to know the type of personality, not the symptoms?

Q. I want to know just what is meant by that diagnosis?

A. Yes. The schizophrenic part of the diagnosis is characterized by a looseness and vagueness in thinking and by a disturbance of emotional response and by abnormal mental trends which may be either delusions or hallucinations. Is that sufficient?

Q. I think that answers my question, Doctor.

In this situation, was this something that you called an advanced case or can you classify it?

(Deposition of Dr. Robert A. Coen.)

A. I would say that she was an early schizophrenic and relatively mild in degree.

Q. Now, do you have any personal knowledge of her course of treatment after you last saw her?

A. No, I have not.

Q. Did you frequently confer or did you confer with Dr. Montgomery concerning her condition?

A. I saw him at least once and I think two or three times.

Q. Would it be necessary in a case of this type for you to advise him on her treatment and so forth, when she is back [71] at home, when she is left in his care; how do you handle the situation?

A. Ordinarily, yes, but I don't believe and I am hazy on this point, I don't believe that I made any particular recommendations because he would have obtained those recommendations from Dr. Dickel.

Q. You, of course, would have no personal knowledge to the extent that he conferred with Dr. Dickel about this? A. No.

Q. About Mrs. Montgomery herself, after you completed treatment, would you confer with her, discuss what had been done or what would be done in the future?

A. I discussed various things with her, just what I don't recall, but I would expect those things discussed to be primarily for the purpose of reassurance to her.

Q. That is the thing I was interested in, Doctor, and probably wasn't asking the question exactly right, but to what extent did you call to her atten-

(Deposition of Dr. Robert A. Coen.)

tion her difficulties and what adjustments, if any, she might have to make and reassurances you might be able to give as a result of the treatment?

A. I can't answer specifically. Ordinarily, patients who have finished a course of electro-shock are fragile people and they require great assurance, more than any specific program that they should follow; a definite outline of things [72] that they should not do would almost have to wait for a short time at least after shock was given.

Q. Would you describe how the shock treatments are administered, what it comprises?

A. Yes. Let me check one thing, because I don't recall that.

Briefly, the patient is given atropine approximately thirty minutes to an hour prior to treatment. The patient lies in bed during the entire course of treatment.

Two: The electrodes are placed on her head. Those electrodes being connected to a machine devised to produce the type of current that will initiate a convulsion. The treatment itself lasts a very short time, two or three minutes, ordinarily, after which the patient is unconscious quite briefly, awakens confused, must remain in bed until a half an hour later, that time being somewhat variable, at which time they are ordinarily reasonably clear.

Q. Was there any other treatment you were giving in addition to that?

A. Only of general nature, sedation at night required for sleep, hydrotherapy, which according

(Deposition of Dr. Robert A. Coen.)

to the records, was discontinued after a short time, and a general program of ward activity.

Q. Are you very selective with that shock treatment?

A. Yes. We arrive at that result after considerable consultation with a patient of this type. [73]

Q. How do you determine that that is the treatment she should have?

A. Things have changed since that time but at that time electro-shock was given to patients who presented any major psychiatric illness, or to patients who presented a depression of almost any degree. The degree was a matter of personal determination on the part of any psychiatrist. How depressed you had to be to have shock in those days was an individual decision.

Q. Do you use it less extensively now?

A. Yes.

Q. Would you have obtained, say the consent of Dr. Montgomery before giving it to his wife?

Q. That was necessary.

Q. So I can a little better understand this, what is the shock treatment supposed to do, what is supposed to be the reactions of a patient to that to get a satisfactory result?

A. In a simple way, it is supposed to relieve their symptoms. The mechanics of that effect is still unknown.

Q. After her second admission to the hospital under your care, had you any opinion as to whether

(Deposition of Dr. Robert A. Coen.)

she would need future treatments? Can you answer that?

A. I can't answer. Often they are necessary, occasionally at least they are not.

Q. But at the time you had finished after her second admission [74] to the hospital, I understand she was still in a delicate condition, or such that you would be very cautious about discussing the treatments you had given her or possibility of future treatment?

A. Since she had no treatment during her first hospitalization, I didn't discuss electro-shock with her until her last admission.

Q. Then you would explore the subject with her at that time, I take it?

A. I am not clear about your question.

Q. You would have obtained the permission of Dr. Montgomery to, of course, give the electro-shock, as you said? A. Yes, sir.

Q. Would you also advise the patient of the nature of the treatment she was about to receive?

A. No. In a very vague reassuring way, yes, but nothing beyond that.

Q. In the difficulties that you diagnosed for this patient, Doctor, can it be related or is it related to the nervous system; in other words, did you find anything other than actual mental disturbance here, any organic nervous disorders?

A. There were no evidences of such but to be sure I called a specialist in the field of neurology

(Deposition of Dr. Robert A. Coen.)
and neurosurgery. His examination revealed no evidence of central nervous system disturbance.

Mr. Hilliard: I believe that is all I have, Doctor.

Q. (By Mr. Whitley): I just want to ask a couple questions to clarify something.

You explained, I believe, that your diagnosis was schizophrenia, paranoid type, is that correct?

A. That is correct.

Q. As you know, Mr. Hilliard and I are just laymen and are going to be laymen sitting on this case. Can you explain to us, would that be in medical terms or the general terms that you speak of, a disease of the brain, or how would you put that diagnosis, just in the simplest laymen's terms you can? A. It is a mental illness.

Q. A mental illness?

A. Which does not necessarily imply that there is something wrong with the nervous system, but only with the functions of the nervous system.

Q. Would you call it a disease?

A. May I say something off the record.

Mr. Hilliard: Yes. This is off the record.

(Remarks off record.)

The Witness: I wouldn't call it a disease. It is an illness. The term mental disease is used by others.

Q. (By Mr. Whitely): One last question, Doctor: Are the words generally now, as used in your profession as a [76] psychiatrist, do they include the old term that we had nervous prostration?

(Deposition of Dr. Robert A. Coen.)

A. No.

Q. Is that more generally a layman's term, am I correct in that? A. That is true.

Q. So then actually the illness for which you treated Mrs. Montgomery, generally speaking as you would refer to, would be mental illness, is that the correct words to use?

A. That is right. Technically it is a psychosis, which is a mental illness.

Mr. Whitely: I think that is all.

Mr. Hilliard: That is all, Doctor."

The Court: Now, do you want him to go to Dr. Lee?

Mr. Gearin: Yes.

(Thereupon, the Deposition of Dr. Louis W. Lee, taken on August 12, 1957 and November 29, 1957, in Denver, Colorado, was read into the record as follows:)

DEPOSITION OF DR. LOUIS W. LEE

"Q. Please state your name and address.

A. Louis William Lee, 2501 Forrest Street, Denver, Colorado.

Q. What is your present age?

A. Sixty-four.

Q. What is your occupation or profession? [77]

A. Physician and surgeon.

Q. Are you duly licensed to practice medicine in the State of Colorado? A. Yes.

Q. How long have you been licensed to practice medicine in the State of Colorado?

(Deposition of Dr. Louis W. Lee.)

A. Thirty-seven years.

Q. Will you please give us a brief resumé of your educational background and your qualifications as a physician and surgeon.

A. I studied premedic work for two years at an extension course in State Teacher's College, La-Crosse, Wisconsin, after high school, and then I entered Hahnemann Medical College and Hospital of Chicago, and spent four years in medical education, and graduated from that school in January, 1919. I served in World War I for a while and was discharged in January, 1919, and entered Denver City and County Hospital and interned for one year. I later took charge of a small hospital at LaVeta, Colorado, for a Colorado mining company and the Denver and Rio Grande Railroad. I came back to Denver in 1929 and started private practice here in Denver. In 1930 I became the medical director of the Bankers Union Life Insurance Company. I belong to the Denver City and County Society and the American Medical Society, Denver Medical Club, staff membership at Children's and St. Luke's Hospitals. I guess that is about all. [78]

Q. Dr. Lee, are you the medical director of Bankers Union Life Insurance Company at the present time? A. Yes.

Q. When did you first become a medical director of Bankers Union Life Insurance Company?

A. January, 1930.

Q. You were employed then as medical director

(Deposition of Dr. Louis W. Lee.)

of Bankers Union Life Insurance Company during the month of October, 1954, were you not?

A. Yes.

Q. Have you served as an officer or director of Bankers Union Life Insurance Company other than as medical director?

A. As a director of the company.

Q. Have you also been an officer of Bankers Union Life Insurance Company? A. Yes.

Q. What office have you held?

A. Vice-president.

Q. What are your duties as medical director of Bankers Union Life Insurance Company?

A. To examine applications and medical reports on all applicants and to approve them for underwriting and issuing of policies.

Q. Have you exercised those same duties since 1930? A. Yes, sir. [79]

Q. And were you exercising those duties in October of 1954? A. Yes, sir.

Q. Are you familiar with the rules and practices of the Bankers Union Life Insurance Company which were in effect and in use in October of 1954 concerning the passing upon applications for life insurance and approval or rejection of such applications from a medical standpoint?

A. Yes.

Q. Did Bankers Union Life Insurance Company in October of 1954 issue an insurance policy on the life of Anna Grace Montgomery, whose residence address was 4100 Southwest 109th Avenue, Beaver-

(Deposition of Dr. Louis W. Lee.)

ton, Oregon, and if so, would you please identify the policy by its number?

A. Yes; No. 27244.

Q. I hand to you a photostatic copy of an application for life insurance and declaration as to insurability, which has previously been marked for identification as Defendant's Deposition Exhibit No. 1, this exhibit being identified during the deposition of John Lyle Montgomery on May 24, 1957, and ask you whether or not you can identify this exhibit.

A. (Referring to document.) Yes.

Q. Will you please state what the exhibit is.

A. The exhibit is an application on Anna Grace Montgomery, 4100 Southwest 109th Avenue, Beaverton, Oregon, for application for life insurance.

Q. I also hand to you a photostatic copy of declaration made to the medical examiner, this declaration having been previously marked as Defendant's Deposition Exhibit No. 2, which was also marked as such during the deposition of John Lyle Montgomery on May 24, 1957, and ask you whether or not you can identify that exhibit.

A. Yes, this is Part 2, which is part of the questionnaire on the medical examination on the application of Anna Grace Montgomery.

Q. Dr. Lee, do the photostatic copies identified as Defendant's Deposition Exhibits Nos. 1 and 2 constitute or compose the entire application of Anna Grace Montgomery for Policy No. 27244?

A. Yes.

(Deposition of Dr. Louis W. Lee.)

Q. Dr. Lee, did you personally examine the application of Anna Grace Montgomery during the month of October, 1954, and prior to the issuance that year of Policy No. 27244? A. Yes.

Q. Did you as medical director of Bankers Union Life Insurance Company approve the application of Anna Grace Montgomery for life insurance, photostatic copies of the application being marked Defendant's Deposition Exhibits Nos. 1 and 2? A. Yes, I did.

Q. Did Bankers Union Life Insurance Company approve the [81] application of Anna Grace Montgomery for life insurance, photostatic copies of both parts of the applications having been marked as Defendant's Exhibits 1 and 2?

A. Yes, they did.

Q. Did the Bankers Union Life Insurance Company issue its life insurance Policy No. 27244 to Anna Grace Montgomery following the company's approval of the application of Anna Grace Montgomery, photostatic copies of the application having been marked as Defendant's Deposition Exhibit Nos. 1 and 2? A. Yes, they did.

Q. Would said Policy No. 27244 have been issued by Bankers Union Life Insurance Company in accordance with the rules and practices of the company in effect and in use in October of 1954 if the application of Anna Grace Montgomery had not been approved? A. No.

Q. In approving the application of Anna Grace Montgomery, photostatic copies being marked as

(Deposition of Dr. Louis W. Lee.)

Defendant's Deposition Exhibit Nos. 1 and 2, did Bankers Union Life Insurance Company rely upon the statements and representations of the application contained in both parts of the application?

A. They relied implicitly on the answers of the questions as mentioned.

Q. Was the action of approval of the said application by [82] the company in accordance with the rules and practices of the Bankers Union Life Insurance Company in effect and in use in October of 1954? A. Yes.

Q. In October of 1954 were the answers to each and every one of the questions contained in the application, the application being composed of Defendant's Deposition Exhibit Nos. 1 and 2, deemed to be material to the risk by Bankers Union Life Insurance Company upon the company's consideration of the application for life insurance?

A. All the questions are deemed very material to the approval of the application.

Q. In October of 1954 was the answer to any one or more of the questions contained in the application deemed by the Bankers Union Life Insurance Company not to be material to the risk upon the company's consideration of the application for life insurance? A. No.

Q. State whether or not prior to the issuance of Policy No. 27244 there was submitted to the company or the company had any other knowledge of information or data in respect to the questions propounded in the application or the answers contained

(Deposition of Dr. Louis W. Lee.)

in the application? A. No.

Q. State the extent, Dr. Lee, to which you as medical [83] director of Bankers Union Life Insurance Company in each instance relied upon the answer made by the applicant, Anna Grace Montgomery, to the questions contained in the application in passing upon the application for life insurance?

A. I relied on the answers, definitely, in order to approve the application.

Q. Specifically, did you as medical director of the Bankers Union Life Insurance Company, in passing upon the application of Anna Grace Montgomery, rely upon the answers of said applicant to questions 27 (e), 28 and 29, which are contained in Part 1 of the application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 1?

A. Yes, they were definitely relied upon as to the answers given.

Q. Did the Bankers Union Life Insurance Company in passing upon the application rely upon the answers of said applicant, Anna Grace Montgomery, to questions 27 (e), 28 and 29, which are contained in Part 1 of the application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 1? A. Yes, they did.

Q. Were the answers made by the applicant, Anna Grace Montgomery, to the questions No. 27 (e), 28 and 29 contained in Part 1 of the application, or any of them, material to [84] the risk which

(Deposition of Dr. Louis W. Lee.)
the company assumed in issuing Policy No. 27244?

A. Yes, very much so, it was material to the risk.

Q. State whether or not Bankers Union Life Insurance Company was induced to issue Policy No. 27244 in reliance upon each of the answers to questions 27 (c), 28 and 29 or any of them, said questions being contained in Part 1 of the application, a photostatic copy of which has been marked Defendant's Deposition Exhibit No. 1?

A. Yes, because they would rely on that, they would be induced to write the policy. The answer is yes.

Q. Dr. Lee, did you as medical director of Bankers Union Life Insurance Company, in passing upon the application for insurance, also rely upon the answers of said applicant to questions 9 and 10 contained in Part 2 of the application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 2?

A. Yes.

Q. Did Bankers Union Life Insurance Company in passing upon the application of Anna Grace Montgomery, also rely upon the answers of said applicant to questions 9 and 10 contained in Part 2 of said application, a photostatic copy of which has been identified as Defendant's Deposition Exhibit No. 2? A. Yes.

Q. State whether or not Bankers Union Life Insurance Company [85] was induced to issue Policy No. 27244 in reliance upon each of the answers

(Deposition of Dr. Louis W. Lee.)

to questions 9 and 10, or either of them, contained in Part 2 of said application, a photostatic copy of which has been marked Defendant's Deposition Exhibit No. 2? A. Yes.

Q. Dr. Lee, I ask you to assume that Anna Grace Montgomery had disclosed to the Bankers Union Life Insurance Company in answer to questions 28 or 29 of Part 1 of her application, or in answer to questions 9 or 10 of Part 2 of her application for the issuance of Policy No. 27244, or in answer to any other question contained in the application, photostatic copies of which have been marked as Defendant's Deposition Exhibits No. 1 and No. 2, that she had been treated by Dr. Robert A. Coen, a psychiatrist in Portland, Oregon, in March and April, of 1951, and further assuming that Dr. Coen had diagnosed her condition as schizophrenia, paranoid type, and further assuming that all of the facts set forth in this question had been presented to the company by Anna Grace Montgomery in her application for the issuance of the above numbered policy, what action would the company have taken upon her application?

A. The application would have been declined.

Q. Had Anna Grace Montgomery disclosed in her application for insurance that she had been treated by Dr. Robert A. Coen in March and April of 1951, what requirements would [86] Bankers Union Life Insurance Company have insisted upon with respect to the consultation or treatment by said doctor?

(Deposition of Dr. Louis W. Lee.)

A. They would have insisted on a report from the doctor as to her condition, treatment, and diagnosis.

Q. In calling for any medical report or certificate from the physician who had been consulted by the applicant, would Bankers Union Life Insurance Company have requested the applicant to furnish the report or certificate or to authorize the physician to furnish such a report to the company?

A. Yes.

Q. Assuming that a request had been made to the applicant to obtain or authorize the company to obtain a report or certificate from Dr. Robert A. Coen, and assuming that Anna Grace Montgomery refused to permit the doctor to disclose the desired information, what action would have been taken by the company on her application for life insurance?

A. The application would have been declined.

Q. Would any action of declination by the Bankers Union Life Insurance Company referred to in your answers to the preceding questions have been in accordance with the rules, practices, and policies of the Bankers Union Life Insurance Company in existence and in use in October of 1954?

A. Yes, they would.

Q. Dr. Lee, I ask you to also assume that in Part 1 of the application for Policy No. 27244, a photostatic copy [87] of which has been marked Defendant's Deposition Exhibit No. 1, the applicant, Anna Grace Montgomery, had disclosed in addition to the information contained therein that she

(Deposition of Dr. Louis W. Lee.)

had treated by Dr. Robert A. Coen in March and April of 1951, and that thereafter Bankers Union Life Insurance Company had called for a medical report or certificate from said physician requesting the physician to state the reason for consultation or treatment, the date, duration, and result thereof, before considering the application further, and further assume that a certificate had been furnished by Dr. Robert A. Coen, and that Anna Grace Montgomery, upon the request of the company, had also furnished an additional statement to the company, and a photostatic copy of the records of Holladay Park Hospital in Portland, Oregon, and that the medical report or certificate from Dr. Robert A. Coen, the additional statement from Anna Grace Montgomery, and the hospital records of Holladay Park Hospital had contained the following assumed facts: That Anna Grace Montgomery was admitted to Holladay Park Hospital in Portland, Oregon, on March 7, 1951; that she was discharged from said hospital on March 10, 1951; that during her confinement in said hospital in March of 1951 she had been diagnosed as having a condition described as schizophrenia, paranoid type; that she was confined in the psychiatric ward of said hospital during that period of time; and that she had been [88] examined and observed by Dr. Robert A. Coen during that period of time; that Anna Grace Montgomery was readmitted to Holladay Park Hospital in Portland, Oregon, on April 9, 1951; that she was subsequently discharged on April 22, 1951; that

(Deposition of Dr. Louis W. Lee.)

she was confined to the psychiatric ward of said hospital during that latter period of time; that she was diagnosed as having a condition described as schizophrenia, paranoid type; that during the period of April 9th to April 22, 1951, while confined in Holladay Park Hospital she received not less than five electric shock therapy treatments; and that during her confinement to said hospital she was observed by and consulted with Dr. Robert A. Coen, what action would Bankers Union Life Insurance Company have taken in passing upon said application for life insurance, assuming that all of the facts stated in this question had been disclosed to the company prior to the issuance of Policy No. 27244?

A. The application would have been declined.

Q. Would the action of the company in declining to issue the policy have been in accordance with the rules, practices, and policies of Bankers Union Life Insurance Company in effect and in use in October of 1954? A. Yes.

Q. Assuming the same state of facts which were set forth hypothetically in the question previously asked you, was the applicant, Anna Grace Montgomery, in your opinion, in good [89] health during the month of October of 1954, and prior to the issuance of Policy No. 27244? A. No.

Q. State your reasons for the answer that you just gave to the preceding question.

A. The report from the hospital and treatment, as stated, and diagnosis indicates a chronic men-

(Deposition of Dr. Louis W. Lee.)

tal ailment which would be considered as an impairment in health at the time when the application was made.

Q. Assuming the same hypothetical facts regarding Anna Grace Montgomery, would she have been considered by Bankers Union Life Insurance Company as being in good health during the month of October, 1954 and prior to the time that Policy No. 27244 was issued to her? A. No.

Q. Please state the reason for the answer to the preceding question that you have just given?

A. They would rely on the okeh or the approval by the medical director as to the report on those conditions."

Mr. Gearin: I think that is all for the first part of the deposition. Then we come to the cross-examination by Mr. Whitely.

(Thereupon, the reading of the Deposition of Dr. Louis W. Lee was continued as follows:)

"Q. Dr. Lee, I understand that you are head of the Medical Department of Bankers Union Life, is that correct?

A. I am Chief Medical Director.

Q. You are Chief Medical Director—that's your proper title? A. That's right.

Q. And how long have you been in that position, Dr. Lee? A. Since January, 1930.

Q. And you are also, as I understand, a vice-president of the company? A. Yes.

Q. And you are on the Board of Directors?

A. Yes.

(Deposition of Dr. Louis W. Lee.)

Q. Do you engage in any private practice other than—— A. Yes, I do.

Q. You engage in private practice as well as hold this position with Bankers? A. Yes.

Q. Can you state just briefly, Doctor, what are your duties as Medical Director?

A. I examine the applications for life insurance and the medical report on the applications that are usually with the application, and I approve or disprove those applications for issuing of life insurance policies.

Q. And do you do all that yourself, or do you have any [91] assistant to help you?

A. No, I don't.

Q. You do all of that yourself? A. Yes.

Q. Do you maintain an office with Bankers Union Life? A. No, I don't.

Q. You have your own office?

A. I have a part office with the first vice-president, a desk.

Q. With the first vice-president? A. Yes.

Q. And then you maintain your own——

A. Private office.

Q. Have you ever had any specialized training in either the field of psychiatry or the study of nervous and mental diseases or ailments?

A. No, I have not.

Q. And could you tell me just roughly—you say you examine these policies—how many of these would you go over in a year?

A. Oh, I would say two thousand.

(Deposition of Dr. Louis W. Lee.)

Q. Around two thousand a year. Now, in addition to checking these policies, do you ever in an application for life insurance locally here in Denver make the examination yourself?

A. Yes, I do. [92]

Q. And is it also the practice of your company when an applicant is in another area outside of Denver to have an examination made by some outside physician? A. Yes.

Q. And was that done in this particular case?

A. Yes, it was.

Q. Now, you may refer to your file if you so desire. Do you recall what outside doctor made the examination of Mrs. Montgomery in the application for this policy of life insurance?

A. Dr. R. B. McGee.

Q. And where is he from, Doctor?

A. He is in Portland, Oregon.

Q. And he submitted a report on this particular case as to Mrs. Montgomery? A. Yes, sir.

Q. And could you state from the examination of Dr. McGee's report which I believe has been marked as Defendant's Deposition Exhibit No. 2, a photostatic copy of which we have here, what did Dr. McGee report as to the state of Mrs. Montgomery's health?

A. He said she was in good health at the present time of the examination.

Q. And you went over that report along with the other report? [93] A. Yes, sir.

Q. In evaluating the application, is that cor-

(Deposition of Dr. Louis W. Lee.)

rect? A. That's right.

Q. Again referring, Dr. Lee, to Defendant's Deposition Exhibit No. 2, the photostatic copy of the declaration made by the medical examiner forming Part 2 of the application, I refer you to Question 10, Subsection (e), which question reads: 'Have you consulted or been treated by any physician for any ailment or disease not included in your above answers? If so, give full details.' And I hand you this exhibit and ask what was filled in in answer to that question.

A. 'Nervousness before and after above surgery. As to results, doctor mentioned excellent, Dr. Joe Cooney.'

Q. Dr. Lee, I hand you the photostatic copy marked Defendant's Deposition Exhibit No. 1, and refer specifically to Question No. 27, Subsection (e), which reads: 'Have you had or have you ever been told you have had or have you been treated for' under Subsection (e) 'epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells?' I ask in referring to that question, Doctor, what was the answer given by Mrs. Montgomery? A. No.

Q. And did you notice on that question the words 'nervous prostration' as being underlined?

A. Yes. [94]

Q. May I ask you in connection with that question, Doctor, what is your definition or explanation of the words 'nervous prostration'? Can you explain a little bit in layman's terms to us?

(Deposition of Dr. Louis W. Lee.)

A. Yes, nervous prostration is a term used more or less by laity where some individual has a severe nervous condition such as being upset, confused, or restless, and not pertaining to any definite mental disease.

Q. Now, also referring, Dr. Lee, to the words 'mental derangement' as used in the same question, would you likewise explain what the meaning of those two words are?

A. Mental derangement?

Q. Mental derangement.

A. Mental derangement in just plain terms is where a person cannot concentrate properly and to interpret their, you might say, their expressions.

Q. I believe you stated on your direct examination that you had examined the records from the hospital where Mrs. Montgomery was confined in Portland, Oregon, called Holladay Park?

A. That's correct.

Q. And from your examination of those hospital records, Dr. Lee, would you say that Mrs. Montgomery would come under the classification as set forth in the application of having nervous prostration? [95]

A. No.

Q. Would you say that she came under the category of being mentally deranged?

A. No. That could be as an added symptom to what she had.

Q. Would you explain that for me?

A. In that when they have some psychosis, which

(Deposition of Dr. Louis W. Lee.)

she must definitely have had, they can be mentally deranged and not have the normal judgment, so you can add that to, sometimes add it to—I have seen a good many times where doctors have put down on a record in hospitals, say, neuropsychosis with definite mental derangement.

Q. But am I correct in this, that from the examination of the hospital records of Mrs. Montgomery, on those records *along,* you could neither say she was mentally deranged or had nervous prostration, is that correct?

A. That's correct, as far as not knowing any of that being put on the record. The only thing we go by is that she had a definite diagnosis, and you will have all kinds of symptoms with that kind of diagnosis.

Q. Well, that diagnosis could result, in other words, in any number of symptoms, is that right?

A. Yes, sir, hallucinations, deliriums, and, oh, such tendency towards suicidal intent, and so on.

Q. Well, it is not uncommon, is it, Doctor, for women experiencing the menopause or about to go into the menopause [96] to suffer from this nervousness and being upset and maybe crying frequently and being depressed?

A. It's very common.

Q. Such symptoms in a woman would not be classified as mental derangement, would they?

A. No, it has mental symptoms.

Q. Would it be classified as nervous prostration, those symptoms? A. Not entirely.

(Deposition of Dr. Louis W. Lee.)

Q. Is there any way that you could tell us so that a layman would understand, how can you classify it, or is there any way to do it, Doctor?

A. To classify severe psychosis or any branch of psychosis, mild psychosis?

Q. Let me restate the question and make it clear. If a woman were suffering from a mental depression and was crying and maybe had a persecution complex or the symptoms we mentioned that are oftentimes attendant to a woman going through the menopause, is there any way that a term could be given to express what that would be in one word or one classification?

A. The common expression is psychosis.

Q. You would usually say that is just a psychosis, is that correct?

A. That's right. There are different types of psychosis. [97]

Q. Could you tell me, Doctor, what is the policy of Bankers Union Life in the matter of issuing an insurance policy to a woman who is experiencing these difficulties such as I mentioned attendant with the menopause?

A. Mild neuropsychosis with menopause is insurable and is considered a fair risk.

Q. Doctor, referring again to Part 1 of the application for insurance marked Defendant's Deposition Exhibit No. 1, did the underlining of the words 'nervous prostration' by Mrs. Montgomery put you on any notice that she might be suffering

(Deposition of Dr. Louis W. Lee.)
from some mental or nervous condition encompassed within the meaning of that term?

A. Yes, it does, but the question was answered no, and then marked underlined that which we didn't put too much on that because in the other questions where it says nervousness, associated with the surgery and possible menopause would clarify it.

Q. Well, is it your testimony then that in answer to the following question which is Question 28 on the application, by putting down the word 'nervousness'——

A. And you will notice also——

Q. Let me finish. By putting down the word 'nervousness,' the date two years and the duration of about two months with the results excellent, and then listing Dr. Joseph Cooney as the attending physician clarified the answer that was [98] given in Question 27 wherein the words 'nervous prostration' were underlined, is that correct?

A. That's right.

Q. Well now, when you noticed, Dr. Lee, in Question 28 the disease or injury put down as nervousness and Dr. Joseph Cooney listed as the attending physician, was any effort made by yourself or anyone else in Bankers Union Life to check that further from any sources, through Dr. Cooney or any other source? A. No, we didn't.

Q. And could you tell me briefly why no further check was made?

A. Because we have a number of applications

(Deposition of Dr. Louis W. Lee.)

that come in that way that mention sometimes nervousness in connection with surgery and so on that we do not follow up on unless we have some definite diagnosis, and so many of the questions were answered no. That's why we didn't have any idea and we did not get the information that we should have had, that is, all in the application and the medical part.

Q. Dr. Lee, I want to go back again to Question 27 of the application, Defendant's Deposition Exhibit No. 1, and if I recall your testimony, Doctor, just now, did you or did you not state that the trouble she had as you determined from the clinical records and the medical records of the hospital in Portland say that she had neither a mental derangement [99] nor nervous prostration?

A. No, I didn't say that.

Q. Well, that's what I wanted to clarify.

A. No, I didn't say that because they made a diagnosis at that hospital. Dr. Coen made a definite diagnosis.

Q. That's right, and that's what I want to get clarified, Doctor. Would that diagnosis of Dr. Coen in Portland result in saying that the patient, Mrs. Montgomery, was suffering from nervous prostration or a mental derangement?

A. Well, I can't answer that exactly because when he made the diagnosis of a schizophrenia, paranoid type, a mild type of insanity, and you can have all types of derangement and prostration and

(Deposition of Dr. Louis W. Lee.)

go to pieces and hallucinations and everything goes with it and persecution as you call it, and all that can go with it. I can't say that she had either prostration or derangement. I can't say that. I can't answer it that way because she can have all kinds of symptoms. That's just symptoms, but a definite diagnosis was made, and when they have a severe neuropsychosis of that type, why we decline every one of them.

Q. In that connection, Dr. Lee, and again referring to the records which you examined from the Holladay Park Hospital in Portland, was not Dr. Coen's diagnosis of a mild case—isn't that correct?

A. I don't remember whether he said mild or not, but he [100] said definitely a schizophrenia, paranoid type, and that's severe.

Q. And you say that is severe?

A. That is severe, definitely.

Q. Even if the doctor that examined her said it was mild?

A. Yes, sir, they couldn't say the paranoid type unless it was severe, if you know what paranoid type is. I know. Most of them go to the state hospitals, committed.

Q. Dr. Lee, it's common practice in the medical profession, is it not, for a doctor who is generally referred to as the attending physician to call in specialists to aid him and assist him on occasion if he feels their services are warranted in a particular case? A. That's right.

(Deposition of Dr. Louis W. Lee.)

Q. In this particular case, Dr. Joseph Cooney was taking care of Mrs. Montgomery as the attending physician, and assuming that he diagnosed her trouble as stemming from the approach of the menopause and recommended advice or consultation or treatment by a practicing psychiatrist, Dr. Cooney would still be considered the attending physician, would he not? A. Yes.

Q. And any other doctor that was brought in on the case, either by Dr. Cooney or by Dr. Coen would likewise be consultants, is that correct? [101]

A. That's correct.

Q. Are you acquainted with a Dr. Herman Dickel in the City of Portland?

A. No, I am not.

Q. Are you personally acquainted with Dr. Robert Coen who formerly practiced in Portland?

A. No.

Q. Or are you acquainted with Dr. Cooney?

A. No.

Q. Would it have made any difference at all, Doctor, in your examination of this application whether the name of Dr. Cooney or Dr. Dickel or Dr. Coen was placed in the space marked for attending physician? A. No.

Q. Dr. Lee, in examining this application, after noting the words 'nervous prostration' being underlined, and the statement that was made by Mrs. Montgomery that she had been treated for nervousness, were you satisfied at that time that no further

(Deposition of Dr. Louis W. Lee.)

investigation was necessary on behalf of yourself or by Bankers Life in the issuance of the policy?

A. Yes.

Q. And it is true, is it not, that Dr. Cooney was never contacted in connection with any further investigation of Mrs. Montgomery?

A. No, he wasn't. From all the information I had on the [102] application and Part 2, I was satisfied from that information that it was all right.

Q. Dr. Lee, I refer to the deposition which you have given in this case on August 12, 1957, and on page 10 of that deposition, starting on line 7, the question was asked you which in substance was this: You stated that had the company known that Dr. Coen had diagnosed Mrs. Montgomery's condition as schizophrenia, paranoid type, you would have declined the application. A. Yes, sir.

Q. And if you had known that, you still say that Bankers would not have passed her on that diagnosis alone? A. No.

Q. And assuming that Dr. Coen in making his diagnosis of Mrs. Montgomery's condition as being very mild, would your company have still not issued the policy?

A. No, not on that diagnosis he made.

Q. Again referring to your deposition of August 12, same page, page 10, the question starting on line 23, you stated in substance on direct examination that had Bankers Union Life Insurance Company known that Dr. Robert Coen had treated Mrs.

(Deposition of Dr. Louis W. Lee.)

Montgomery in March and April of 1951, the company would have insisted on a report from the doctor as to her condition, treatment, and diagnosis. Do you recall saying that that was true? [103]

A. Yes, sir.

Q. Would you just clarify for me then, Doctor, why when Mrs. Montgomery indicated on her application that she had been treated for nervousness and had underlined the words 'nervous prostration' did you not consult Dr. Cooney who was given as the attending physician for that?

A. Because he did not make any diagnosis. Nervousness we don't pay much attention to if it's connected with menopause or with surgery.

Q. As I understand your previous testimony, no request was ever made for a medical report or a certificate from Dr. Cooney?

A. No. We had the medical physical report from this doctor that made Part 2.

Q. And you never requested Mrs. Montgomery to obtain or authorize Bankers Union Life to obtain a medical report or a certificate from Dr. Cooney?

A. With the application they sign a receipt at the bottom which we can refer to the doctors who treated her or made the examination for any other information that might be pertinent to the case.

Q. Now, Doctor, I am going to give a hypothetical question similar to that given to you on your direct examination to this effect. Assuming

(Deposition of Dr. Louis W. Lee.)

that Mrs. Montgomery was confined to Holladay Park Hospital on March 9, 1951 and was discharged from the hospital March 10, 1951, and was readmitted to the [104] hospital on April 22, 1951, and she was diagnosed as having a condition of mild schizophrenia, paranoid type, and that during her confinement in the hospital she received five electrical therapy treatments, and further, she was examined by a specialist in the field of neurology and neurosurgery, and that this examination revealed no evidence of central nervous system disturbance, and that she was discharged without any further treatment being prescribed, under those circumstances, would Bankers Union Life still have refused to issue the policy? A. Yes, sir.

Q. And assuming the same set of facts, Doctor, which I set forth in the previous question, can you state with any degree of certainty what the condition of Mrs. Montgomery's health was in 1954 at or just prior to the time of the issuance of the policy?

A. No, only from the physical report given by the doctor.

Q. Would you clarify that answer for me just a little? You say no.

A. From the physical examination and report given by the doctor with the application for life insurance, that revealed her to be in good health.

Q. Maybe I didn't make myself really clear on this question. I will repeat. I know you are answer-

(Deposition of Dr. Louis W. Lee.)

doctors called in by the attending physician should have been listed, is that correct?

A. Absolutely.

Q. Would it not be true, Doctor, that if there were a question as to the insurability of Mrs. Montgomery, that the information as to her condition could have been obtained had the company contacted Dr. Cooney who was listed as the attending physician?

A. That's possible, but they did not show any such impairment that was necessary.

Q. Would it have been any more notice to you or to Bankers Union Life if the words nervousness had been put down on the ailment which Mrs. Montgomery allegedly suffered from and had she listed Dr. Coen and Dr. Dickel and whatever the name of the man was, the doctor in the field of neurology?

A. Definitely, because then we would have immediately figured that she had some mental disease that required specialists to help in.

Q. Would the mere fact that the names of the doctors were given indicate to you they were specialists?

A. No, we look them up in the directory and then we find out. We look them up in the medical directory and find out what their specialties are.

Q. Dr. Lee, the fact that you are the Director of the Medical Department of Bankers Union Life, also on the Board of Directors and a vice-president, you naturally have a pretty strong interest in the

(Deposition of Dr. Louis W. Lee.)

outcome of this case, do you not? A. Surely.

Mr. Whitely: I think that's all the questions I have.

Mr. Hames: I have just one question.

Examination

Q. (By Mr. Hames): Dr. Lee, prior to the time that you approved the application of Anna Grace Montgomery for the policy of life insurance that was issued to her in October of 1954, did you have any information of any kind or any indication of any kind that she had previously been diagnosed as having schizophrenia of a paranoid type?

A. No."

Mr. Gearin: Defendant rests, your Honor.

The Court: Have you any depositions?

Mr. Davis: No, your Honor, we do not have any.

The Court: Proceed, Mr. Davis. [109]

ROBERT C. McGEE

a witness produced in behalf of plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Davis): Dr. McGee, what is your full name? A. Robert Columbus McGee.

Q. What is your profession?

A. I am an osteopathic physician and surgeon.

Q. Where are your offices?

A. Hillsboro, Oregon.

(Testimony of Robert C. McGee.)

Q. How long have you practiced this profession, Doctor? A. Fifteen years.

Q. Briefly, where did you get your training?

A. At Kirksville, Missouri; Kirksville College of Osteopathy and Surgery.

Q. Have you any specialty, Dr. McGee?

A. No, I am in general practice.

Q. You are licensed to practice here, osteopathy here in Oregon? A. Yes, sir.

Q. How long have you had a license?

A. Ten years.

Q. Dr. McGee, have you done work for the Bankers Union Life Insurance Company? That is, have you examined people at their request? [110]

A. I have.

Q. Were you previously acquainted with Dr. Montgomery and Mrs. Montgomery? A. Yes.

Q. Will you explain to the Court and jury your acquaintanceship with them?

A. Well, it was on a social basis. Dr. Montgomery and I are on the same staff at the Portland Osteopathic Hospital.

Q. Were you closely acquainted, or was it a close personal acquaintanceship or what?

A. No, it was entirely on a professional and social basis.

Q. Dr. McGee, would you explain briefly when a person comes in and wants to be examined for an insurance company what happens?

Mr. Gearin: Your Honor, we object unless it is

(Testimony of Robert C. McGee.)

confined to what was done at this particular time to this particular applicant and for this company.

The Court: Yes, I think so. Go ahead and tell what you did in this case.

The Witness: Well, the patient brought in the application.

The Court: Brought it in where?

The Witness: In my office.

The Court: Is that in Hillsboro?

The Witness: Yes, sir. [111]

The Court: You had your office in Hillsboro at that time?

The Witness: Yes.

The Court: Proceed.

The Witness: I filled out the questions and forms as they are stated on the application.

Q. (By Mr. Davis): The application form, your Honor, I wonder if Dr. McGee could be given it?

The Court: Yes.

(Application form presented to the witness.)

Q. (By Mr. Davis): Do you recall, Dr. McGee, at the time that Mrs. Montgomery came out there was she by herself, or was Dr. Montgomery with her? A. She was by herself.

Q. Do you know whether she made an appointment or not with you, or do you know whether an appointment was made?

A. Well, I think she made an appointment. I am not sure. I mean——

(Testimony of Robert C. McGee.)

Q. If you are not certain, say you are not certain. A. I am not certain.

Q. Did she hand you this form that you are holding in your hand there? A. Yes.

Q. That is an exhibit—has this been admitted?

Mr. Gearin: No. [112]

Q. (By Mr. Davis): Dr. McGee, did you fill out that form in your own writing, in your own handwriting? A. Yes.

Q. Did you sign it yourself? A. Yes.

Q. Is that a photostatic copy or a copy, if you can look at it, of the original application form?

A. I would assume yes.

Q. Do you recognize your handwriting there?

A. Yes.

Mr. Davis: At this time, your Honor, we would move that the Deposition Exhibit No. 2 be admitted into evidence.

Mr. Gearin: I have no objection.

The Court: It may be admitted.

(Thereupon, photostatic copy of application form previously marked Deposition Exhibit No. 2 and remarked Plaintiff's Exhibit No. 2-A for identification, was received in evidence.)

[See pages 230-231.]

Q. (By Mr. Davis): Now, in filling out the form, can you recall exactly what happened when Mrs. Montgomery was there?

A. No, I couldn't state exactly. It has been quite a while ago.

(Testimony of Robert C. McGee.)

The Court: Will you speak a little more loudly, Dr. McGee? [113]

The Witness: Yes.

Q. (By Mr. Davis): This application, is it in duplicate or triplicate or what?

A. It has been quite a while since I have filled one out, but I am sure it is just the one form. I don't recall any duplication on any of the Bankers' policy forms or any of the other insurance forms.

Q. Do you have a copy that you keep in your office? A. No.

Q. Is there a copy that you give to the applicant or to Mrs. Montgomery?

A. No, I mailed this in myself.

Q. Does she sign anything on the application form?

A. Not on the part that I fill out.

Q. Well, that is the whole thing there, isn't it, Doctor?

A. Well, yes, but over on the other side she signs, and this was filled out, as I recall, before she came in. That is her personal part to fill out for Bankers, sir.

Q. You say she filled that in before she brought it in?

A. Well, I don't remember whether it was or not, but I believe—I believe that was filled at the office. She filled that out herself, then we came to my part. I don't recall exactly.

Q. Dr. McGee, you made an examination. Would

(Testimony of Robert C. McGee.)

you tell the jury and the Court what examination you made. Did you [114] just follow this form down there? A. That is right.

Q. Would you start in on the form and advise the jury what you found and what you did and what you filled in?

A. Would you like for me to go clear through the whole thing?

Q. Well, no, the jury will have it, but do you ask a question? Is that a question and answer form where you ask a patient part of it?

A. Part of it; check the patient individually.

Q. Did you make a complete physical examination of Mrs. Montgomery? A. I did.

Q. Did you reflect on this form what your examination—what you did and what you found?

A. I did.

Q. With regard to reflections, just briefly what examination do you make for the insurance company?

A. We check knee jerk, ankylosis, muscle tone, is about the extent of the questions that are asked on these forms.

Q. Do you take blood pressure?

A. Oh, yes.

Q. Do you have them take various tests to determine their blood pressure after they have done exercise, things of that nature?

A. I believe that is true in this form. It is so many times. [115] I would have to go over it.

(Testimony of Robert C. McGee.)

Q. Doctor, have you done work for Bankers Life before? A. I have.

Q. Have you filled out applications for them before for other people? A. I have.

Q. Are you one of their, are your names on their list to do work for them? A. Yes.

Q. Do you bill the Bankers Union Life for this work? A. I do.

Q. They pay you then? A. Yes.

Q. From your examination and the tests which you made, Dr. McGee, of Mrs. Montgomery, did you fill that out in your report?

A. Yes, as I found it.

Q. What did you report to Bankers Union Life with regard to her over-all general physical condition? A. She was in good health.

Q. Do you take any type of a test that has anything to do with their physical and mental condition, Dr. McGee?

A. Not anything further than what is on the application.

Q. Did you ask the questions of Mrs. Montgomery regarding phases of those questions there? Did you discuss it with her? [116]

A. Well, that I don't remember. I assume that anything that needed discussion, why, we discussed it. I don't remember.

Q. Could I see that?

(Exhibit presented to counsel.)

Q. Doctor, No. 10, I believe: "How long have

(Testimony of Robert C. McGee.)

you known applicant and how well?" Your answer was: "Four years."

A. Yes.

Q. Do you recall that?

A. Well, I don't recall it, but that would be about right.

Q. Doctor, there were certain things in this medical history of Mrs. Montgomery that you knew yourself, didn't you? A. Yes, some of it.

Q. Was that through discussions with Dr. Montgomery or on the staff or something of that nature?

A. Right.

Q. There are a number of personal questions in here on the back that Mrs. Montgomery signed also, is that correct? A. Yes.

Q. That is what you are referring to, her signature? A. Yes.

Q. You don't know whether she filled this in or how? Do you know that? A. No, I don't.

Q. With regard to this: "Have you consulted or been [117] treated by any physician for any ailment or disease not included in your above answers?—(If so, give full details.)" Now, the first one, you said, "Have you ever undergone any surgical operation?" The answer is, "Yes, Suspension Uterus, Excellent, Dr. Ira Neher." Who furnished the information to you?

A. She did.

Q. Did you know that she had had an operation or was having trouble, Doctor, with her uterus?

A. Yes, I had known, yes—I didn't know ex-

(Testimony of Robert C. McGee.)

actly what type of surgery she had had. I knew that Mrs. Montgomery had been in the hospital and had undergone surgery, but I had never checked into exactly what it was.

Q. This question (e), "Have you consulted or been treated by any physician for any ailment or disease not included in your above answers," there was the word, "No"; then it was crossed out, and it was, "Yes." "Name of Ailment—Nervousness before and after above surgery—excellent—Dr. Joe Cooney."

I would like to hand this back, give it to you, Dr. McGee, and ask you if you know whether that is in your writing or in whose writing that is?

A. That is not in my writing.

Q. That is printed?

A. That's right.

Q. Doctor, do you recall having a conversation with [118] Mrs. Montgomery with regard to that?

Mr. Gearin: We object, your Honor. The doctor has already said he does not remember any discussion with regard to questions and answers.

The Court: Objection overruled. Answer the question.

Q. (By Mr. Davis): Did you have a discussion with regard to this, Dr. McGee, discussing the filling out of this form?

A. I may have. I can't recall.

Q. Did you know that Mrs. Montgomery had been confined in the Holladay Park Hospital?

Mr. Gearin: Objected to, your Honor, on the

(Testimony of Robert C. McGee.)

grounds and for the reason that the information he received from outside sources would not be binding upon the company unless it was disclosed at the time of the examination that he made for which he may have been deemed to have been acting in our behalf.

Mr. Davis: I will limit my question, your Honor.

Q. At the time that you examined Mrs. Montgomery for the Bankers Union Life, did you know of the prior condition, Doctor, that is, her nervous condition?

Mr. Gearin: Just a moment, please. We object, your Honor, on the grounds and for the reason that his knowledge at that time may have been acquired from other sources, and I think it should be limited to the information—to his examination that he made at that time, and I further object upon the other ground, that the witness has stated he cannot [119] recall what was said at the time.

The Court: I am going to sustain the objection at this time with permission to make an offer of proof in a few minutes.

Mr. Davis: Very well, your Honor.

The Court: Did Mrs. Montgomery tell you that she had been in the Holladay Hospital?

The Witness: I don't recall, your Honor.

The Court: Go ahead.

Q. (By Mr. Davis): Dr. McGee, let me ask you as a basis of questions of whether you recall it or not, there were certain things that you knew yourself, and there were certain discussions that

(Testimony of Robert C. McGee.)

you had at the time of the examination; isn't that correct, Doctor? A. Yes.

Mr. Gearin: This is leading, your Honor. It is his witness, your Honor. The witness says he can't remember.

The Court: I am going to take a recess now for about ten minutes. Ten minute recess.

(Thereupon, the jury returned for recess, and, having retired, the following proceedings were had out of the presence of the jury:)

Mr. Davis: If your Honor please, the question I would like to ask——

The Court: Ask it. [120]

Q. (By Mr. Davis): Doctor, I had discussed this matter with you Saturday afternoon with regard to——

The Witness: Yes.

The Court: Wait a minute. Just ask him the questions. This is an offer of proof. Just ask him that same question that you asked before; namely, did you know whether she had been in the Holladay Hospital of your own knowledge?

The Witness: Yes.

Q. (By Mr. Davis): Did you know, Dr. McGee, that she—that a consultant psychiatrist was brought in to see her and treat her for a psychiatric condition?

A. I assumed that because of the Holladay Park being what it is and knowing that Dr. Cooney is not on the staff.

Q. Well now, when you assume it can you re-

(Testimony of Robert C. McGee.)

call, Dr. McGee, whether you had discussed in the office with Mrs. Montgomery regarding this nervous condition, discussed it with her personally or not?

A. I wouldn't say. I imagine we did, but I can't —I can't say that I did.

Q. The reason I asked you this question based upon your personal knowledge and based upon any conversations you had, at this time you do not know whether it was at the office or whether it was from other personal information; is that correct?

A. That is correct. [121]

Q. And for that reason you do not want to testify what was said at the office because of your personal knowledge and your conversation?

A. That is correct.

Q. Doctor, to every question that you recall asking Mrs. Montgomery, did she give you an answer?

A. Yes, as I remember, every question was answered.

Mr. Davis: Now, I have not finished, your Honor. There are other questions I was going to ask the defendant in the presence of the jury, but the offer of proof would be that, your Honor, of his prior knowledge.

The Court: Are you telling us that she may have told you about the Holladay Park Hospital?

The Witness: It may have been brought up, your Honor, but I can't say whether it was a conversation that we heard at the staff at the hospital or whether it was questions that were brought up

(Testimony of Robert C. McGee.)

by her. I just really can't—I really can't say. Truthfully, I just can't remember.

The Court: She may have disclosed to you that she had been to the Holladay Park Hospital?

The Witness: Well, I already knew that, but whether it was discussed by she and I at the time, your Honor, I can't remember.

The Court: Do you want to ask any questions (to Mr. Gearin)? [122]

Mr. Gearin: No, sir.

The Court: How does it happen you did not disclose that to the company then if you knew she had been to Holladay Park Hospital?

The Witness: Well, they asked for the referring doctor. I didn't know anything about it. I mean, I know she had been there, but to what extent or who had seen her, they asked for the referring—or who her attending physician was, and, as far as I knew, it was Dr. Cooney. I didn't know who specifically had been her doctor before, and I don't recall that I asked that. They asked for the attending physician, and I just put down Dr. Cooney.

The Court: You didn't think it was incumbent upon you to divulge that information?

The Witness: Well, I didn't feel it was necessary, your Honor.

The Court: Did you know that she had been diagnosed as a schizophrenic?

The Witness: No, sir, I didn't.

The Court: You never knew that?

(Testimony of Robert C. McGee.)

The Witness: I didn't know that until after this time, as I recall. I knew she had been in there for what was technically a nervous condition. I knew that she had had pelvic surgery.

The Court: At the Holladay Hospital? [123]

The Witness: No, at our hospital.

The Court: She had been in the Holladay Park Hospital because of the nervousness?

The Witness: Right.

The Court: You didn't know which doctor treated her?

The Witness: No, sir, I didn't.

The Court: You didn't know the severity of the illness which she suffered?

The Witness: No, sir, I didn't.

The Court: You relied solely upon her statement that the results were excellent, or did you discuss it with Dr. Cooney?

The Witness: No, I didn't discuss it with Dr. Cooney what the word "excellent" was. In talking with her she was, as far as I was concerned, perfectly well.

The Court: Did you talk it over with Dr. Montgomery?

The Witness: No, I didn't.

The Court: Did you regard it as strange that they would come out to Hillsboro to have an examination?

The Witness: No, because they lived at Beaverton, and it was really closer. I don't remember whether Mrs. Montgomery called and made an ap-

(Testimony of Robert C. McGee.)

pointment or whether they just came out. No, I didn't think that a bit strange, sir.

The Court: It seems to me that in view of the witness' [124] statement to the effect that he does not recall exactly whether Mrs. Montgomery told him that she had been to Holladay Park Hospital or whether he knew it from prior contact makes this testimony admissible on the ground that she may have divulged the information to him and he, in his judgment, elected not to put it down.

I realize that it is highly irregular for a physician to do that, but this man says that is what he did, and I appreciate the fact that it is difficult testimony to meet, but I am going to overrule the objection and permit the witness to testify. If you want to bring in a question of collusion, you can do it.

Mr. Gearin: It is a little bit difficult at this time, your Honor, to do it at this time. The doctor can't remember. I won't make any remarks about how I feel personally, but I think it is difficult enough to try a case for an insurance company with all that prejudice, and I think your Honor has gone out of your way to make a case for them when, according to their testimony, they never had it in the first place. I feel badly about it.

The Court: Mr. Gearin, I just do not like those remarks. I have tried to give everybody a square deal, and I have leaned over backwards for you in this trial and in other trials, and this type of remark does not go in this case. I believe I am

(Testimony of Robert C. McGee.)

going to hold you in [125] contempt. I am going to assess penalties after this case. No one has ever accused me before of going out of the way to help an insurance company or to hurt an insurance company, and I think it is highly improper for you to have made that kind of a statement when I have tried my very best to see that this trial is conducted in the very best manner and asked this jury to leave while I took this testimony under the rule or an offer of proof.

Mr. Gearin: I have never been consciously disrespectful to this Court or never——

The Court: Yes, you were just now.

Mr. Gearin: If your Honor feels that way, I apologize and apologize sincerely, but I feel the testimony of the witness is such that they didn't have a case, and I thought your Honor's interrogation was unnecessary.

The Court: Of what witness?

Mr. Gearin: Of the witness on the stand.

The Court: Are you talking about in the absence of a jury?

Mr. Gearin: Yes, sir. Now, perhaps I have misunderstood, but it seems to me that when you ask me is there anything I want to do after I have made my objection and it has been sustained and then you are going to let it in again——

The Court: I am not letting this testimony go in. This is an offer of proof. [126]

Mr. Gearin: You said you were going to overrule my objection.

The Court: Yes, but these questions are not going to be propounded to the jury. I am not asking him any questions. Mr. Davis is the one that asks him the questions.

Mr. Gearin: That's right, and then I have interposed an objection, and your Honor indicated—and I may be mistaken and I hope honestly that I am—that the objection would be overruled and that I could go into the question of collusion. Now, that indicated to me that you were going to let this testimony go before the jury.

The Court: What testimony are you talking about?

Mr. Gearin: The testimony with regard to the offer of proof.

The Court: I am just trying to find out whether his testimony concerning the statements he made to this deceased are admissible or not admissible. None of this offer goes before the jury.

Mr. Gearin: I don't like to argue with your Honor, but I am in the dark. I don't know where I stand now. I am in contempt——

The Court: You certainly are.

Mr. Gearin: May I ask the nature of the Court's ruling with regard to your statement that you are overruling the objection? May I inquire as to that? [127]

The Court: I told you the reason. The reason why I interrogated this witness further was to determine precisely the basis upon which this testimony may or may not be admissible. It was admissible, in any event, because the witness has

stated here that he does not recall exactly what the deceased told him. She may have told him that she had been to Holladay Park Hospital in addition to his own knowledge. If that is true, then the plaintiff has the privilege of bringing that out because his interpretation of the questions would depend upon the information divulged to him at the time. That is the only thing that I have ruled upon, that he can bring out that information. That is all I did. I didn't do it in the presence of the jury. I didn't ask him one question in the presence of the jury.

Mr. Gearin: Well then, I am still, your Honor, confused as to whether or not the jury will be entitled to the testimony that the witness may or may not have discussed this and she may or may not have told him. That is the purpose of my present inquiry.

The Court: And that was the purpose of your inquiry when you accused me of leaning over backwards against the insurance company; isn't that right?

Mr. Gearin: Your Honor, I am still——

The Court: Answer the question.

*The Witness*s I don't know how to answer it, your Honor, [128] because I don't know precisely whether or not you have sustained the offer of proof. I made no objection. I asked no question. Now, your Honor sustained my objection previously, and then Mr. Davis made an offer of proof. Now, the offer of proof, I know, was made outside the presence of the jury. Is the ruling of the

Court now that this matter can be gone into in the presence of the jury?

The Court: That is absolutely right, and the witness—I changed my ruling. He can ask that question. The jury is not going to be read the questions and answers that were made either by Mr. Davis or myself.

Mr. Gearin: Well, I understand that, your Honor. That is never done.

The Court: Yes.

Mr. Gearin: During an offer of proof, I mean, that stays in the court record, and then what the jury hears is what comes from the stand, but I just wanted to get clear in my own mind——

The Court: Now, I am clear in my own mind. I thought you might have been mistaken, but there was no mistake. You accused this Court of leaning over backwards against the insurance company in favor of this plaintiff, didn't you?

Mr. Gearin: I felt, your Honor, that your interrogation [129] in connection after counsel had made his offer of proof, I felt, was unnecessary.

The Court: Unnecessary?

Mr. Gearin: Yes, sir.

The Court: You are not the one to determine whether I regard it as necessary, and I thought that actually I was asking questions which were favorable to the insurance company.

Mr. Gearin: I did not so understand it, your Honor.

The Court: Do you mean to say that when I said to him that it is highly irregular for a physi-

cian not to divulge that you felt that was a friendly remark towards the plaintiff?

Mr. Gearin: I didn't think—well, every time I open my mouth I get into further trouble.

The Court: Bring down the jury.

(Thereupon, the jury returned to the jury box, and the following proceedings were had in open court:) [130]

ROBERT C. McGEE

recalled, testified as follows:

Further Direct Examination

Q. (By Mr. Davis): Dr. McGee, at the time Mrs. Montgomery was out in your office for examination, at that time did you have knowledge that Mrs. Montgomery had been in the Holladay Park Hospital here in Portland? A. Yes.

Q. Did you know the names of the doctors that were taking care of her at the Holladay Hospital?

A. No, I didn't.

Q. Do you know that they were doctors there—I mean, let me ask you this question, Dr. McGee. Did you know that Dr. Cooney was not affiliated or attached——

The Court: Well, that is not the question that you indicated you wanted to ask. You wanted to ask, and the question that I sustained an objection to and later set aside my ruling was: Did she divulge to him at the time that she had been to the Holladay Hospital. First, let him answer that question, and then you can proceed with the other line of interrogation.

(Testimony of Robert C. McGee.)

Mr. Davis: Yes.

The Witness: I don't recall at the time whether that was discussed or not. I did know that she had been to Holladay Hospital, but whether it was discussed, your Honor, [131] at that time or not I don't remember, with Mrs. Montgomery.

Q. (By Mr. Davis): Dr. McGee, in filling out the form, "Results—Excellent," I believe you testified that you filled this form out and found her health was good? A. Yes, sir.

Q. Was there any indication, Doctor, when you examined her at that time that she was suffering from any mental disease or mental illness or was under a nervous tension of any kind?

A. No, sir.

Q. In filling out this particular form, it is over a course of conduct, I assume, Doctor, these examinations that you do for the insurance company; is that correct?

A. I didn't quite understand that question.

Q. Well, you can't recall, can you, Doctor, exactly what took place in your office with Mrs. Montgomery that particular day, do you?

A. No, I don't.

Q. But, is it a course of conduct that you do with each person that would come in?

A. Yes, as the form itself states, I do just as that says.

Q. In filling out the form about the list of doctors that you have advised and in filling out that form or if it is filled out making inquiry of doc-

(Testimony of Robert C. McGee.)

tors, what do you do? Do you list all doctors, or do you find out what particular [132] doctor?

A. No——

Mr. Gearin: Objection, your Honor. We would like this confined to what was done then.

The Court: Yes, objection sustained. What did you do in this particular case?

The Witness: In this particular case I just put down the one attending physician.

Q. (By Mr. Davis): That was Dr. Cooney?

A. Right.

Q. Are you given any particular instructions, Doctor, from the Bankers Union Life Insurance Company? Do they send you a form of instructions and ask you to do certain things and to get certain information that does not appear in this application form? A. No, sir.

Q. Pardon? A. No, no comment.

Q. There is nothing, no rules and procedures they have given you?

A. Only what is on the form that the patient brings—or the examinee.

Q. In that form, why, the attending physician was put on, or it was on?

A. I put it on, Dr. Cooney as attending physician. [133]

Mr. Davis: I think that is all.

Cross Examination

Q. (By Mr. Gearin): Doctor, you cannot recall specifically anything that was said between you

(Testimony of Robert C. McGee.)

and Mrs. Montgomery at the time of your examination? A. No, sir, I cannot.

Q. As far as putting down Dr. Cooney's name, you knew that from beforehand, did you?

A. No, I knew that Dr. Cooney was her attending physician, and I can't remember whether the question was asked. I assume that I asked her, but to say exactly I asked Mrs. Montgomery, "Who is your attending physician?" I can't say I honestly remember that, but I knew that Dr. Cooney, while she was in our hospital, under our care, I knew he was her attending physician. I assume I asked her because it is the thing to do, to ask who her attending physician is, so I assume I asked her, but to say exactly I remember I asked her I can't say.

Q. You don't have any memory one way or the other with regard to that particular question or the particular answer on the form, do you?

A. No, no.

Q. Thank you, Doctor, I have no further questions. [134]

Mr. Davis: One other question, your Honor, I should have asked.

Redirect Examination

Q. (By Mr. Davis): In the back of that form that you filled out which was signed by Mrs. Montgomery, I asked you if some of that was her writing, but was part of that your writing on the back of that form, Doctor?

A. May I check that again? (Witness examines document.) My signature is on there.

(Testimony of Robert C. McGee.)

Q. All right, with regard to the words, "Excellent" and so on, do you know who wrote that?

A. I couldn't say. I assume that—well, I just wouldn't want to say because it is printed and I couldn't say for sure that I did it or Mrs. Montgomery.

Q. From your examination of Mrs. Montgomery, your physical examination, your conversation at the time you were with her, was there any question in your mind, Doctor, as a doctor, that there was anything wrong with this woman?

A. At the time I examined her, no.

Mr. Davis: That is all.

Recross Examination

Q. (By Mr. Gearin): Doctor, you did not make a mental psychiatric examination, [135] did you?

A. No, I didn't.

Mr. Gearin: Thank you, Doctor. No further questions.

The Court: You are excused from further attendance at the trial.

(Witness excused.) [136]

JOHN L. MONTGOMERY

plaintiff, recalled, testified as follows:

Direct Examination

Q. (By Mr. Davis): Dr. Montgomery, Mr. Gearin went briefly into your background. How long did you practice general osteopathy back East?

(Testimony of John L. Montgomery.)

A. Well, I was an osteopathic physician for a period of about two years in general practice. Then, as I related, I went back and took a residency in a hospital to become a radiologist or what is more generally known as an X-ray specialist.

Q. What year was that, Doctor?

A. Well, that would probably have been, let me see, 1942, two years—1944—probably—before I took my residency?

Q. When did you get your specialty, Doctor?

A. Oh, my specialty training, well, that is easier for me to figure. I have been a specialist approximately ten years.

Q. When did you first meet Mrs. Montgomery?

A. I met Mrs. Montgomery near the end of my internship, which would have been in 1942. I took a vacation and went to this resort area where she lived.

Q. Briefly, shortly after you met Mrs. Montgomery, several months later, did you marry her?

A. Yes, there was a short courtship, and then she came to Detroit, stayed with an aunt, and we continued our courtship, announced our engagement and became married.

Q. Where were you practicing, in Detroit later on, or did you go to a smaller community?

A. Soon after we were married we went to a smaller community.

Q. Where was that?

A. A community called Spring Lake, Michigan, on the West Coast of Michigan.

(Testimony of John L. Montgomery.)

Q. Where was Mrs. Montgomery born and raised?

A. She was born and raised in St. James, Beaver Island, Michigan, which is an island offshore of the West Coast of Michigan, Lake Michigan.

Q. How long was she there, Doctor?

A. She went through high school there, after which she came out and lived with a sister in a larger community and worked at various and sundry things, and she had returned again to her home because of the lingering illness of her father, and that was the time at which I met her.

Q. After you were married, you had two boys; is that correct?

A. Two boys. They are eleven and thirteen.

Q. During the periods of the birth of the children and so on, would you explain to the jury her physical condition, her general health? [138]

A. Well, the first few years that we were married my wife and I—or I should say my wife was subjected to frequent hospitalization by virtue of the fact that we proceeded immediately to have a family. She had a chronic appendix, and, not wanting that to flare up during pregnancy, she went in the hospital right away and had an appendectomy about the third month we were married. Thereafter, she became pregnant, delivered our first child, and as soon as her health returned she became pregnant again and became quite ill about the fifth month and aborted and lost a girl. As soon as her health returned, then she again became pregnant

(Testimony of John L. Montgomery.)
and delivered our last son. Do you want me to continue through——?

Q. When did you move out to Oregon, Doctor?

A. We moved out to Oregon about 1950.

Q. Briefly, could you just tell the jury her health condition up to that time?

A. Mrs. Montgomery had had one operation before we moved to Oregon, and she had had one ovary operated upon. We noted after our arrival here that the rain the first winter was depressing to her. The times that it was most noticeable were in relationship to her menstruation, particularly after the menses, and she had two small children to take care of at that time, and she became during those periods agitated and depressed, and it was hard to pin down just what the [139] reason was. She also developed a facial neuralgia that was superimposed up on top of all this, and eventually she had to have a surgical cleansing of an area of infection in the bone.

Q. That involved her death; is that correct?

A. Yes.

Q. At the time, Doctor, just immediately prior to going to the hospital in March of 1951, could you explain to the Court and jury what her condition was?

A. Well, as I previously stated she would at times become agitated and she was smoking two to three packs of cigarettes a day, and at times she would cry, or I might come home and find her crying and, oh, yes, and at times she felt that her,

(Testimony of John L. Montgomery.)

some of her own relatives had said things in the past that upset her that were not true.

Q. Doctor, who was her attending physician at that time, during that period of time?

A. The doctor who testified here earlier, Dr. Joseph Cooney. He is primarily an internist, a man that deals with diagnoses.

Q. When were you advised, or were you advised that Mrs. Montgomery was going to be sent to the hospital?

A. The first time that she went to the hospital.

Q. In March?

A. In March, yes. Dr. Cooney suggested to us that she be sent to the hospital because her agitation was to such [140] an extent that he didn't feel, from a medical viewpoint, that it fell within his realm to manage it, and he would like to have consultation.

Q. Did you agree to that, Doctor? A. Yes.

Q. What did Mrs. Montgomery feel about it?

A. She did not agree. She argued the point with us and did not concur the first time, and so we had to put it to her quite bluntly that, well, she just had to go, and that's all there was to it.

Q. That was March, and that was for two days, Doctor?

A. Yes, for two days of observation, following which she came out, and she was over her resentment towards us telling her that she had to go. She realized that it was a good thing then, and she was glad that she had gone in.

(Testimony of John L. Montgomery.)

Q. At that time was there a question involving menstrual period. A question of menopausal, Doctor?

A. If you are asking me about that particular moment she was in a menstrual cycle at that particular time and day, I don't recall, but these periods of depression were usually associated with that time, and so it could well have been.

Q. How old was your wife?

A. My wife was, as I recall it at that time, twenty-nine; however, we related this to a menopausal situation despite her youth and because it is well-established that, oddly [141] enough, the earlier women begin their menses the later they go through their change of life, and the later they begin their menses the earlier they go through their change of life. My wife had not begun her menstruation until she was seventeen, and she gave a history of having two sisters who had gone through very early menopausal changes, in their late twenties, early thirties.

Q. Who was it that decided in April—it was just less than a month's time, wasn't it, that Mrs. Montgomery was taken back to Holladay Hospital?

A. Yes.

Q. Would you explain why?

A. Yes, because again she became depressed and agitated and would cry and would smoke cigarettes. She was never an individual to drink heavily, but if we went out socially I don't mean that she would get drunk. She would nervously drink her liquor

(Testimony of John L. Montgomery.)

and be excitable a combination not of drunkenness but a combination of this nervous agitation, smoking cigarettes and putting her drink down and talking in an agitated manner with people and skipping from one subject to another in her discussion. Therefore, I talked it over with her and with Dr. Cooney, and she agreed again that this time to go back to the Holladay Park, and Dr. Cooney referred her there again.

Q. Dr. Montgomery, at all this time, and I use a layman's [142] language in it, was she mentally deranged; was she doing things as how I would understand—was she—did you feel she was a menace or dangerous or a mental——?

A. Oh, no, no, there was nothing about it that was dangerous. Those things—mentally deranged I would immediately conclude was some organic thing like tumor pressure or previous injury to her skull, some type of thing like that. It would not have fitted in that category. In extreme psychiatric situations like, for instance, with menopausal situations, you have many depressive states, but then you also have in psychiatric situations some manic states in which category she didn't fit at all.

Q. In April she was there for about two weeks; is that correct, Doctor? A. Yes.

Q. Did the doctor at that time discuss with you, or was she—I believe Dr. Coen's deposition said they released her to you. Would you explain to the

(Testimony of John L. Montgomery.)
Court and jury how she was at that time when she was out of the hospital?

A. I went and saw her daily. She enjoyed good health. Her shock therapy which has been discussed previously, shock can be administered in varying degrees depending upon the situation for which you are treating the individual, and she was always able to coherently talk with me. I was aware of her shock therapy by virtue of the fact that she told me [143] when I came into the hospital, "Well, I had shock therapy today an hour ago," or she had shock therapy the day before, or she would say, "I am due for a shock treatment next Friday." She was not particularly perturbed. I will retract that. She was perturbed on one thing. She didn't like to be on the second floor because on the second floor it is psychiatric, and they keep the doors locked, but they have everything up there from alcoholics to people who are in cells and manacles, and she—it took her a while to accept the fact that there were other people in there who were like she was. At first she was upset to think that she had been put in here where there were patients—she heard one patient screaming loudly on her way to hydrotherapy. It upset her to think there were patients like that in there, but once she found she had freedom of the place, she could play cards with these people, she found two people that she knew who were in there, and she would take me down to the solarium and introduce me to the people who were there that you could play

(Testimony of John L. Montgomery.)

cards with or checkers or smoke cigarettes and talk, and, as I recall, I think they later—I am not sure, but I think they even gave her freedom to go out and get a newspaper or something like that, something of that order.

Q. After two weeks, Doctor, the question I asked you was after two weeks she was let out of the hospital; is that [144] correct? That would have been in the latter part of April, 1951. Now, what was her health condition after she was out of the hospital up to October, 1954, generally?

A. Her health was good. She took to gardening, and we started to take vacations in the winter to break the monotony of the rainy situation, and we started to go south into California and Mexico in the winter and would usually take our children along. She participated with everything with me socially, went to our staff meetings once a month and dinners with the doctors and their wives, and we went out socially everywhere together. She liked to dance. We did a great deal of that.

Q. Doctor, did she take trips where she took the children, for instance?

A. Yes, one summer then she took the car and the two children and one of the technicians in the hospital, and they drove east, and she and the children visited with her mother and spent probably two weeks there and then returned, probably gone for the best part of a month.

Q. Was there any nervous condition after this

(Testimony of John L. Montgomery.)
time, or did she have trouble with her menstrual periods or anything of that nature?

A. Yes, she continued to have some trouble during her menstruation and would be definitely edgy during those times and probably smoke a little heavier but I couldn't [145] say that—certainly there was no comparison to the way she had been previously.

Q. In talking with Dr. Cooney or Dr. Dickel or Dr. Coen, did you ever discuss the matter with Dr. Dickel, to your knowledge, at that time?

A. No.

Q. Did you talk with Dr. Coen; do you recall?

A. I don't recall personally meeting with Dr. Coen in the hospital or our going up to his office, but I recall that we discussed it on the telephone once and possibly twice.

Q. About your wife's condition? A. Yes.

Q. At that time did he give you a diagnosis that she was a schizophrenia, paranoid?

A. No, he did not state that to me. He talked again in terms of nervousness, nervous exhaustion, prostration; that it would be very good for her to get outside and develop herself in the garden and relax to take some of the burden of the responsibility of the children from her and that type of thing.

Q. You naturally were interested in the welfare of your wife, weren't you, Doctor?

A. I certainly was.

(Testimony of John L. Montgomery.)

Q. Did you discuss with Dr. Cooney and Dr. Coen?

A. Yes, most of my discussions would, of course, have been [146] with Dr. Cooney because I would see him around the hospital frequently.

Q. Dr. Cooney didn't know anything about the Holladay Hospital situation did he, Doctor?

A. He had referred her.

Q. That's what I mean, but with Dr. Coen did you have any conferences with him, discussions with him, to your knowledge? A. No.

Q. Other than the telephone? A. No.

Q. At the time the application for the Bankers Union Life Insurance Company was taken out, would you briefly give the background of how you happened to take out this policy—you took out a policy for yourself, didn't you? A. Yes.

Q. Would you briefly explain the background of it?

Mr. Gearin: Your Honor, I don't think this would be material unless it has to do with the execution of the application.

The Court: Objection sustained.

Q. (By Mr. Davis): You have testified briefly of receiving these forms. You do not know whether it was in your office or whether it was mailed to you or not; is that correct?

A. Mr. Graham brought those forms to us, but I don't recall whether he mailed them or whether he dropped them [147] off to the house personally.

Mr. Davis: If your Honor please, I would like

(Testimony of John L. Montgomery.)

to for this one purpose go into the background briefly if I may have the right later on to lay a matter of proof.

The Court: You would like to do what?

Mr. Davis: I would like to go into briefly the background of the purpose of taking out this policy. I don't believe it is pertinent.

The Court: I don't think so. I am going to sustain the objection. I will let you make an offer of proof later.

Q. (By Mr. Davis): In filling out the application, Doctor, some of this writing, Doctor, or the printing on it, are you able to identify it, what you filled in yourself or whether Mrs. Montgomery filled it in or not?

A. It appears to me that a fair portion of this is in my handwriting. It is so fine that there are, there are some places where I would have to debate, and it is so long ago that I cannot definitely recall. For the most part, I would say that a great deal of it is in my handwriting; that we probably sat down and went over this together.

Q. You filled out the forms. Now, who underlined the "nervous prostration"; do you know?

A. Offhand I would say no to that, but first I have to find it.

Q. It is 27. [148]

A. Well, all of the N's here, there are just two letters to try to determine the handwriting from. They are just No, and these N's appear to be made

(Testimony of John L. Montgomery.)

continuously. If they are, then they are not my handwriting.

Q. When discussing it with Mrs. Montgomery, you decided to underline "Nervous prostration," didn't you, Doctor? A. Yes.

Mr. Gearin: Just a moment, Doctor. That was highly leading. I ask that that be stricken and the jury instructed to disregard it.

The Court: I think it is leading, and the jury is instructed to disregard it.

Q. (By Mr. Davis): What is underlined, Doctor? A. Underlined is "Nervous prostration."

Q. Do you know why it was underlined?

A. I would judge it was underlined——

Q. No, I just want to know why; do you know why it was underlined?

A. Because she was nervous.

Q. Well, is there any other—in the questions that were asked in this series any other place to mark or underline with regard to this hospitalization, in your opinion, or in your wife's opinion that would cover the situation?

Mr. Gearin: We object to the opinion, your Honor. The document speaks for itself. [149]

The Court: I think that is true. That is a matter of argument.

Mr. Davis: All right, your Honor.

The Witness: Do I understand——

The Court: No, there is no question.

Mr. Davis: What did the effect, what was this underlining of "Nervous prostration," do you know

(Testimony of John L. Montgomery.)

what it was covering, what it was supposed to be covering?

A. I would know that it would be making an exception in (e) which states epilepsy, mental derangement, nervous prostration, syphilis, and so forth; that it would be making a notation of an exception; that she put No because she knew she didn't have all these other things as syphilis, epilepsy and so on, but there was a notation underlined here because this was an exception.

Q. You do not understand my question, Doctor. Did it apply—to what period of time of illness or sickness?

A. Oh, that she had nervous prostration?

Q. Yes.

A. It would apply to her condition several years previously.

Q. All right, are you referring to the condition that she was in the hospital? A. Yes.

Q. Then after underlining this, this was written in below there, wasn't it, in 28? [150]

A. "Nervousness, two years ago"?

Q. Correct.

A. "Complications, none; Results, excellent; attending physician, Dr. Joseph Cooney."

Q. Do you know whether you filled that in, whether your wife filled it in or what, Dr. Montgomery? A. No, I do not know.

Q. Then there was a suspension of the uterus at what time?

A. The suspension of the uterus was around the

(Testimony of John L. Montgomery.)

same time. It may have been done just a little before that. In other words, that was not two years. The suspension might have been three years.

Q. In filling out, working on this application, Doctor, did you assist your wife, both of you assist each other in filling it out? A. Yes.

Q. Was there anything that you were attempting to conceal in this application from this insurance company? A. No.

Q. This was just a straight life insurance, wasn't it, Doctor?

A. No, this wasn't straight life insurance. This was——

Mr. Davis: Just a minute. Your Honor, I should not have asked that question, and I will make a matter of proof on it. I am sorry, I should not have. [151]

The Court: All right.

Q. (By Mr. Davis): At the time this application was filled in, would you tell the Court and jury what Mrs. Montgomery's general health was and her physical condition?

A. Why, her health and physical condition were —couldn't help but qualify it as good. She had the ability to do all her housework, to manage her two children, to take our car and drive it to the store and shop, to take a vacation, to go anywhere with me socially, and I would just say that it was good.

Q. Was it any different, or, I mean, did you have completely normal relationships of husband and wife, and was she a healthy woman?

(Testimony of John L. Montgomery.)

A. Yes, we had completely normal relationships.

Mr. Davis: I think that's all.

Cross Examination

Q. (By Mr. Gearin): Doctor, referring to the application where "Nervous prostration" is underlined, what answer was given by you and by Mrs. Montgomery to that question?

A. "No," because all the other things, syphilis and so forth——

Q. Did she have nervous prostration?

A. Did she have nervous prostration?

Q. Yes. [152]

A. Yes, I would consider that she had a—or a tendency towards what would be qualified as nervous prostration.

Q. Can you give us an unqualified yes or no answer with regard to this question: Did she or did she not have nervous prostration?

A. If you could explain to me exactly what you want to know by the word "nervous prostration."

Q. Well, what did you think it meant by the words "nervous prostration" in the application?

A. I think that "nervous prostration" means a wearing down of the nervous system just the same as you can wear down a knee with arthritis or a heart with overwork, you can wear down the nervous system.

Q. Is that what you had in mind when you and Mrs. Montgomery answered that question?

A. Yes, we felt that she had had (if that is what

(Testimony of John L. Montgomery.)

you consider nervous prostration); that she had had a wearing down of her nervous system.

Q. That is why you answered "No" to the question: "Have you ever had nervous prostration?"

A. I can't say that we meant—the "No" was intended to cover all of these things asked. "No" covered all these other things, but "Nervous prostration," being underlined, would indicate that she had had some nervous prostration.

Q. Would you take a look at question No. 27? Do you have [153] question 27 there?

A. 27, yes.

Q. What does that say?

A. "Have you had or have you ever been told you had or have you ever been treated for."

Q. Is nervous prostration under there?

A. Yes.

Q. What is the answer to that question: "Have you ever been treated for nervous prostration?"

A. There is a "No" after it with all the others.

Q. Doctor, there was a time subsequent to her being in the hospital that the children had to be put in boarding school; was there not?

A. Yes, we put the children in boarding school.

Q. Now, in connection with her condition in the spring of 1951, you called in a psychiatrist at the Holladay Park Hospital for what reason, Dr. Montgomery?

A. Would you repeat that, please?

Q. Why did you call in someone from the Hol-

(Testimony of John L. Montgomery.)

laday Park Hospital in the spring of 1951 to take care of Mrs. Montgomery?

A. As I recall, Dr. Cooney called in someone from there, and it was upon his recommendation.

Q. Did you feel that in your field of medicine that you were able to diagnose the scope of her condition? A. My field? [154]

Q. Yes.

A. No, indeed. I am very limited in my field. I am a radiologist.

Q. The same with Dr. Cooney?

A. Pardon?

Q. The same with Dr. Cooney?

A. Dr. Cooney felt it was out of his scope.

Q. Was she or was she not resentful of the doctor putting her in the hospital, Doctor? Was she resentful of doctors who put her in the Holladay Park Hospital? A. The first time.

Q. How about the second time? A. No.

Q. I call your attention, Doctor, to the hospital record signed by Dr. Cooney, notation 4-21: "Husband says there is still resentment about the doctor who sent her in." Now, I take it that would be incorrect?

A. I think that the resentment there at that time would have been towards Dr. Cooney but not towards — there was no resentment on her part about going into the hospital at that time. There were many doctors involved; not just Dr. Cooney.

Q. There were lots of doctors taking care of her, I take it?

(Testimony of John L. Montgomery.)

A. Well, Dr. Cooney had referred her, and we know from the records that there were many consultants on her. [155]

Q. Dr. Cooney did not perform the electroshock therapy, did he? A. No.

Q. At the time she was first in the hospital, Doctor, did she have delusions?

A. Not to my knowledge.

Q. All right, did she have any delusions the second time she went into the hospital?

A. Possibly even on the first question I should have requested again to go into what you mean by delusions.

Q. Did she have a delusion about her sister and mother-in-law, that they had tried to keep her in turmoil, had told lies about her and had tried to upset her and wreck your practice?

A. Yes, if that is what you mean by delusion.

Q. How about the second time, Doctor?

A. Did she have delusions the second time?

Q. Yes. A. I cannot truthfully recall.

Q. Referring to specifically — I will give you some examples, and you can tell us whether she had delusions or not. Did she have delusions that a sermon at the church was directed toward her?

A. Yes.

Q. Did she have delusions that there was an armless war veteran behind her? [156]

A. I don't recall that one.

Q. Did she have delusions about throwing the children in the pit in the zoo?

(Testimony of John L. Montgomery.)

A. That is difficult to answer. May I elaborate?

Q. Surely.

A. Not throwing them in, I don't recall that after the incident, that she ever mentioned it again, but I remember we went to the zoo while she was feeling upset, and I lifted one of the children up so they could see in, and it frightened her. She screamed, thinking that the child was going to go in, but I did not interpret it that I was attempting to throw the child in, but I remember distinctly that it upset her. I don't recall her referring to it after that.

Q. Do you say that this condition is due to or connected with the menopause?

A. Do I feel that it was?

Q. Yes. A. Personally myself?

Q. Yes. A. Yes.

Q. Were you here when the Deposition of Dr. Coen was read? A. Yes.

Q. Do you agree with this statement then, that he could [157] not recall any reference to or connection between the menopause and her mental illness?

A. Yes, I recall that in his deposition.

Q. Do you agree with Dr. Coen? A. No.

Q. Did you ever discuss with Dr. Coen sending Mrs. Montgomery to the Twin Pines Sanitarium at Belmont, California or the Livermore Sanitarium at Livermore, California?

A. I don't recall discussing that with Dr. Coen; however, I might have discussed with him the pos-

(Testimony of John L. Montgomery.)

sibility of getting consultation back where I went to school just merely because I knew the man, and he might have countered with other various suggestions.

Q. You discussed her condition with Dr. Coen?

A. Yes.

Q. Did you admit the possibility of Mrs. Montgomery having been a schizophrenic?

A. I admit that as a possibility.

Q. Did you ever ask Dr. Dickel, Dr. Coen, or Dr. Cooney what was the matter with Mrs. Montgomery?

A. Do you want me to take them collectively?

Q. One at a time. Did you ever ask Dr. Dickel what was the matter with your wife? A. No.

Q. Did you ever ask Dr. Coen what was the matter with [158] your wife?

A. I don't recall it as a direct question in that order. I would have said that I discussed it with him on the telephone.

Mr. Gearin: I have no further questions, your Honor.

Mr. Davis: There was one question, your Honor, I wanted to ask him.

Redirect Examination

Q. (By Mr. Davis): Doctor, when you filled out this application form, did you know that your wife was diagnosed as a mentally insane person?

A. No.

Mr. Gearin: We object to that, your Honor. There is no contention made of any insanity.

(Testimony of John L. Montgomery.)

Q. (By Mr. Davis): Did you know that she was a schizophrenic paranoid?

A. I can't say truthfully that I knew that she was. I could not deny that I might have discussed it as a potentiality or a possibility.

Q. But in the over-all discussions that you had had with everybody involved in the thing in filling out this application form, based upon your discussions and everything, you had done your best to put down what you honestly believed what it was? [159]

A. Yes, because you understand that as an osteopathic physician and as medical physicians it is somewhat like the C.I.O. and A.F. of L. You don't always get along as institutions, but as individuals. Dr. Cooney was not on the staff, nor was I, at Holladay Park; therefore, in utilizing them as referring men there still is a wall, I mean, I was not privileged to walk in there and ask a lot of questions, and so a great deal of my thinking was channeled through the discussions with Dr. Cooney.

Q. There are here exhibits, the hospital records, Doctor. When was it that you first saw those hospital records? A. In your office——

Mr. Gearin: That would be immaterial, your Honor.

The Court: The question has been answered. There is no contention that he saw them anyway. The objection is sustained.

Mr. Davis: That is all.

Recross Examination

Q. (By Mr. Gearin): Is there any reason why

(Testimony of John L. Montgomery.)

you could not have asked Dr. Dickel what, in his opinion, was the matter with your wife?

A. Why I could not have?

Q. Yes.

A. Yes, because the case, as I understand, was not [160] referred to Dr. Dickel.

Q. Was there any reason why you couldn't have asked Dr. Coen what, in his opinion, was your wife's trouble?

A. There is no reason why I could not have.

Q. Why didn't you?

A. As long as the information was funneled to me through Dr. Cooney——

Q. Why didn't you ask Dr. Coen, the psychiatrist that was called in by Dr. Cooney, what was the matter with Mrs. Montgomery?

A. We discussed it on the telephone is all. We did not sit down and direct questions.

Mr. Gearin: That is all. Thank you.

Q. (By Mr. Davis): You did discuss it on the telephone, didn't you?

A. We discussed it on the telephone, yes.

Mr. Davis: That is all.

Mr. Gearin: That is all.

The Court: I think this is all the testimony, isn't it?

Mr. Davis: Yes, your Honor.

The Court: Do you have any rebuttal, Mr. Gearin?

Mr. Gearin: No, sir.

The Court: Ladies and gentlemen, please re-

(Testimony of John L. Montgomery.)

member, do not make up your minds as to how this case is to be [161] decided until you have heard the arguments of counsel and the instructions of the Court. You are now excused until ten o'clock tomorrow morning.

(Thereupon, the jury retired at 4:30 p.m. for the evening adjournment.)

(Thereupon, the jury having retired, John L. Montgomery was recalled to the stand on offer of proof and testified as follows:)

Direct Examination

Q. (By Mr. Davis): Dr. Montgomery, would you briefly advise how you happened to take out this policy for your wife?

A. Yes. Mr. Graham, the agent for Bankers, made many calls in my office trying to interest me in this type of thing over a period of months. Many other osteopathic physicians, he pointed out, in the State of Oregon, some of whom I knew and some of whom I did not, had utilized his company. Eventually we got to a place where my wife and I felt that we should increase our policies or savings, thinking of retirement, and we picked as a figure $30,000. Mr. Graham then brought in this policy, and we discussed the phases of it, and it was primarily a policy for retirement. It, of course, had a life insurance feature added to it. He then suggested to me that several other doctors that he had sold this policy to had split the [162] premiums with their wives in that it was primarily for your

(Testimony of John L. Montgomery.)

mutual benefit and retirement, that you could take advantage of the fact that the premium would be cheaper with your wife being younger and a woman because insurance rates are lower both on women and younger individuals.

Q. Go ahead.

A. We discussed it at home and decided that that would be worth consideration and told Mr. Graham to write the policy in that manner so he wrote the policy for $15,000 apiece on both of us with the retirement age at age 65 when we would receive "X" number of dollars. Because we were both young and traveled and because we had children, he recommended that we consider the double indemnity factor, and because it was not a great deal of addition we both took the double indemnity factor, meaning then that we had each $15,000 retirement policy with a double indemnity factor, and this gave us the advantage of a cheaper premium.

Mr. Davis: That is all.

The Court: The offer is rejected.

Mr. Davis: At this time, your Honor, could I make part of the record, this is an addition based upon this morning's statement by Mr. Gearin. I didn't make a record of it at all, but it is my understanding the Court is going to permit Mr. Gearin to have the opening argument and also the closing argument? [163]

The Court: That is right.

Mr. Davis: At this time I would like to take exception to the Court's ruling on that because

merely by coming in and admitting some parts of the allegations and then permitting them to have the opening and closing would put them in the same position as a plaintiff in bringing this action.

The Court: I think that the defendant has admitted the execution of the policy, and the burden of proof is on the defendant. Therefore, I am going to rule that since they have the burden of proof they can open and close.

Did you see the interrogatories that I left with both of you? Mr. Gearin, have you any objection to these interrogatories?

Mr. Gearin: Yes, sir, I think, your Honor, that the question with regard to listing names of the doctors is something that does not have to be wilfully withheld, but the fact if they have treated or consulted is a matter which, if they do not list the doctor, will be deemed to be legal fraud, and it does not have to be wilfully admitted. Other than that, I think they are all right with the exceptions of questions (b) and (c). There is no dispute but what the whole testimony is that the answers were material and that the defendant did rely upon them.

The Court: I do not know if they did or not. You are the one who submitted those. I took them right out of your requested instructions. You have six requested instructions, using the identical language.

Mr. Gearin: If those are in there, then I am in a poor situation to complain now.

The Court: I used your exact words.

Mr. Gearin: I did not know at the time the in-

structions were prepared as to what their testimony would be as far as materiality or whether or not we would rely upon it, and so I had to shoot everything. It was all blank. Now, since both parties have rested, I think I can state there is no issue for admission to the jury as to either items (b) or (c), of any of the interrogatories 1 to 4, inclusive.

The Court: I do not think that there is any question that the other doctors were consulted, but I am willing to give another interrogatory that asks if the interrogatory was correct. That is the plaintiff's view, that the interrogatory was answered correctly, and I am willing to submit that if you want that also.

Mr. Gearin: I think in fairness, your Honor, then if that is in, then depending upon what the answers are, we may present the matter again under—I have forgotten the name of the case.

The Court: That is Chandler vs. Mutual Life of New York. [165] Those cases look quite good, but I think the plaintiff has the right to have it submitted. Do you want me to submit 2 altogether, or do you want me to delete figure 2, or do you want me to ask that question also?

Mr. Gearin: I think figure 2 and (a) should be in there, your Honor.

The Court: Well then, if 2 (a) should be in there, what difference does it make if (b) and (c) are also answered because even if it is immaterial how can that hurt you? The only thing it can do, if they answer that it was material and that the

defendant did rely on it, that strengthens your position, doesn't it?

Mr. Gearin: That's right, but they might make a mistake.

The Court: Because if they answer (a) that it was wilfully false, under the Chandler case you may be entitled to prevail.

Mr. Gearin: Will your Honor give another one in 3, No. 29, asking was it true or false?

The Court: I did ask them that: Was the answer wilfully false.

Mr. Gearin: I don't think, your Honor, it has to be wilfully false in order for us to prevail. If it was false in fact, we are entitled to prevail. I am talking about interrogatory No. 3. [166]

Mr. Davis: I don't think interrogatory No. 3 should be in here on the basis of the others.

The Court: Why?

Mr. Davis: It says here, No. 29, "Have you ever been advised to have a surgical operation." That hasn't anything to do with it.

The Court: It uses the word in the disjunctive.

Mr. Davis: Yes, "Or have you ever consulted any physician for any ailment, not included in any of the above answers." Well, your Honor, in above, they listed above here nervousness and had the attending physician up here.

The Court: That is your interpretation, but their interpretation is that she failed to show in one of the answers psychosis and that, having so failed, she should have put it in down here.

The only one that I had difficulty with was No.

27. I was going, on the basis of the testimony, I was going to delete interrogatory No. 1, but the only reason I am now going to submit it is because of the testimony of your own witness. Dr. Montgomery indicated that he interpreted it. According to the company's own doctor, with the psychosis there was no place to answer No. 27. All right, I am going to give these interrogatories the way they are. [167]

Now, I am going to tell you what I am going to instruct. I am going to tell them that they are to answer certain questions, and these are the questions they are going to be asked to answer. I am going to tell them that the insurance company has the burden of proof. Then I am going to give them the ones about best evidence. Then I am going to tell them the questions contained in the application must be given their natural and normal meaning; however, if there is any ambiguity, that ambiguity must be resolved against the insurance company because it is the insurance company that prepared the application. However, that rule of construction only applies in case a question is ambiguous and not clear. There is an Oregon case, Purcell vs. Washington Life Insurance Company, a case that Mr. Frank Howell tried, I think, and it says that the two constructions must be equally reasonable, and if they are, then the construction most favorable to the assured is the one that is to be used.

I am going then to instruct it is the duty of all applicants for life insurance or health and accident

insurance to truthfully and completely answer all questions contained in an application for insurance. In this case the evidence is uncontradicted that the plaintiff, an osteopathic physician and the husband of Anna Grace Montgomery, the applicant for the insurance, jointly [168] prepared the application, and therefore, not only must the answers truthfully and completely set forth all information requested of her in connection with this application, but it must also truthfully and completely reflect all the information of which plaintiff had knowledge at the time of the application. There is no objection to that?

Mr. Davis: No; that is correct.

The Court: Plaintiff and the deceased were bound not only to state truthfully what she, in fact, represented, but they were also obligated not to suppress or conceal any facts within their knowledge which materially qualified the statements made, for under the law a partial disclosure of facts accompanied by a wilful concealment of qualifying facts is not a true statement. Is there any objection to that?

Mr. Davis: Other than this, your Honor, it would have to be done wilfully, and it would have to be material. The Court will cover the material end of it, I assume.

The Court: A statement is made wilfully false if it was untrue when made and was known to be untrue by the person making it or causing it to be made and if the statement was made deliberately and of one's own choice. A statement is also made

wilfully false if made recklessly without regard to whether the statement is [169] true or false, and if such statement is, in fact, false.

These are the only instructions I propose to give in the case. I think they will cover it. Is there anything else?

Mr. Davis: We are satisfied.

Mr. Gearin: No. [170]

The Court: Do you want to make a motion for a directed verdict?

Mr. Gearin: I have submitted a written one, your Honor. I think for the sake of the record the defendant moves the Court for an order directing the jury to return its verdict against plaintiff and in favor of defendant on the grounds and for the reason that it affirmatively appears without question that the plaintiff and the deceased, Anna Grace Montgomery, at the time of the application for insurance to the defendant, made answers in the application which were made false, wilfully false, and with regard to the answer requesting the names of doctors who had been consulted for any ailment as set forth in question No. 29, the names of the doctors were not filled in, and even though that may not have been done wilfully, it amounts to legal fraud vitiating the policy.

The Court: I am going to take it under advisement. Is there any other instruction that you think should be given?

Mr. Davis: I think the ones that you have read are sufficient and which I will argue about.

The Court: That is perfectly all right. That is

the reason why I have told you what the instructions are so you can gauge your argument accordingly. [171]

Mr. Davis: Let me say this, your Honor, I assume it is not necessary to reserve our rights. The Court has advised us you are going to submit interrogatories to the jurors, and we do take exceptions to that.

The Court: You may have an exception. Is there any other exception that you think you want to have?

Mr. Gearin: Your Honor, I would not make objection to any instruction that your Honor gives since you have advised us what they are. I think they fairly present the issues as long as the matter is being presented to a jury; however, I think, your Honor, since we have just got these interrogatories a little while ago, I would like leave to present to the Court another interrogatory along the lines of No. 3 to ask only if the answer was true or false. Under the Chandler case, your Honor, they might think they have to make it wilfully false, and they may want to find they made it inadvertently or something like that.

The Court: Do you want to do that on 3 and 2 both or just on 3, or do you want to do it on all?

Mr. Gearin: No, I think, your Honor, to be fair it only applies to the names of doctors. I think it would unduly confuse the matter if we asked it for all of them because I think you have to show it as wilfully false insofar as the other items are concerned. [172]

The Court: You just want 29 (a), "Was such answer false?" (b) "Was such answer wilfully false?"

Mr. Gearin: That would be fine if we could have it that way, if it can be just typed in above.

The Court: No, we will do that over. Mr. Davis, what have you got to say?

Mr. Davis: Your Honor, as I said, we object to 29.

The Court: I know that, but I think under the Chandler case he is entitled to that, except doesn't the Chandler case use the language of wilfully false in connection with fraud? Don't they say that fraud is imported by the failure to use that language?

Mr. Gearin: I think the words are it amounts to fraud.

The Court: Legal fraud.

Mr. Gearin: The fact that you do not disclose amounts to fraud, that fact in and of itself.

Mr. Davis: I think the Chandler case says that, your Honor, but that Chandler case has to be considered, the doctor took this man's tonsils out, and here he is over here taking treatments for tuberculosis, and although the Court said the man didn't know that he had tuberculosis so we won't consider that, yet, he knew within his mind that there was a doctor over here treating him for tuberculosis, your Honor. [173]

The Court: You can argue all you want that Dr. and Mrs. Montgomery answered this question honestly and correctly because you have got a question

about the treating physician, and you can also argue the two methods of construction, but that is not the point. I think he is entitled to have his theory of the case presented to the jury. If you get a judgment here, you want a judgment that is going to hold up.

Mr. Davis: I sure do, but I want to try to at least get a judgment, your Honor.

The Court: The jury is not going to make very much difference between false and wilfully false, I think.

Mr. Davis: I think that is right.

The Court: I think he is entitled to have it. I am going to put it in. Three will be, "Was such answer false?" Then I am going to give the other three. We will recess until tomorrow morning at ten o'clock.

(Evening recess taken.) [174]

December 10, 1957, 10:00 a.m., Trial Resumed

The Court: Ladies and gentlemen, all the testimony having been admitted yesterday, we will now hear arguments by counsel and instruction of the Court. Mr. Gearin.

Mr. Gearin: If the Court please, ladies and gentlemen of the jury, the case has been rather short, and the evidence, I think, is fresh in your minds, and I will not dwell upon the evidence.

The first question you must decide is what was the condition of Mrs. Montgomery, and I think the evidence satisfies you, from the doctors to whom she was referred, that her condition unfortunately was a mental illness. She had been diagnosed by

the psychiatrist in charge who had seen her at Holladay Park Hospital, as schizophrenic, paranoid. There is no doubt about that. No one seriously contradicts the opinion of the psychiatrist or of the hospital records. The hospital records show, and I do not think it will serve any purpose to review it at great length, the unfortunate situation in which Mrs. Montgomery found herself. Although this is not a proper thing for a doctor to discuss, it is one of those things that I think you will be satisfied from all the evidence that the company, before it insured the lady for the $30,000 had a right to know about. This was not a nervous condition. Dr. Cooney and Dr. Montgomery felt that the situation was [175] so unusual, it was so serious, that they were not able in their profession to take care of her. They had to send her by ambulance to the Holladay Park Hospital. You will find on seeing the hospital records that she was to be placed under restraint, if necessary; that she was in the Psychiatric Ward with the doors locked. She had to have electric shock treatments. Now, her health at the time was serious, a serious mental illness. I do not think there is any question about it. Again I say it was nothing of a nervous nature because if it had been Dr. Cooney would have been able to take care of her.

Dr. McGee performed no neurological examination. He performed no—I mean, no mental examination at the time of the application for the policy. The company had no knowledge of her condition. It is true that Dr. McGee himself from his

social acquaintance with the Montgomerys knew that she had been to Holladay Park Hospital, but his knowledge on the outside certainly cannot be charged to the company because he did not tell you that question was ever discussed between him and Mrs. Montgomery, the question of doctors. We know that she was treated by Dr. Coen, Dr. Dickel. They were her treating doctors. Dr. Cooney had been merely the originating doctor. It is the same situation as if you go to your family doctor, and he says, "There is something the matter with you. I [176] don't know what it is. I am going to send you to a specialist," and the specialist finds out, and he tells you and your family that you have a cancer. It is serious. You go to the life insurance company and you say — they ask you, "What doctors have you seen?" You say, "I saw only the family doctor." I think that all of you would feel, to be fair, that you should have told the company, "Well, I go to the family doctor, but he sent me to a specialist, and the specialist made these findings."

Now, I say again this was not a nervous condition. Neither was it a condition associated with the menopause because Dr. Coen when he testified by deposition, you will recall at that time said he has no memory, no record of any association between the two.

The next question is: Did the deceased, Mrs. Montgomery, know this. We know that there was some sort of an understanding or agreement or some discussion between Dr. Cooney and Dr. Montgomery to keep the true nature of this from Mrs.

Montgomery so she wouldn't become more disturbed. However, she did know that she was in a Psychiatric Ward at the hospital, and, according to the records, she had a great resentment for the doctor that sent her in there. She knew she was taking shock treatments. She knew that is the place where she was. According to Dr. Montgomery, she said she finally found out the [177] people were there for the same thing that she was.

The next question: Did Dr. Montgomery know about this? Certainly he did. He knew that the thing that bothered and troubled his wife was beyond his ability to cope with. He knew although, as I say, he has had general practice, he was in charge of a hospital at one time, it was also beyond the ability of Dr. Cooney, the family physician. He talked to Dr. Coen, the psychiatrist. Her condition was discussed, and he admitted the possibility that she might have been schizophrenic.

The question is: Did the applicant and did Dr. Montgomery make a full, fair, and honest application to the company? Did they come forward in good faith and say, "Well, we have had the family doctor, and there is something we think you ought to know."

You will have certain interrogatories, certain questions and answers that you members of the jury are going to be called upon to answer yes or no; true or false. You will have the application, and it is very obvious to me that there was no full disclosure.

Another item in this case that you are going to be

called upon to answer is whether or not this was material, whether the company relied upon the representations made. Of that there is no dispute. Dr. Lee's testimony has been taken, and he has told us by deposition that had the [178] company known that, certainly a policy would never have been issued.

So the real question is: Were the answers true or false, and on that I am not going to argue any longer because I think that inside the mind and heart of the impartial individual there can be no question that something was concealed, something was held back.

Then the fourth part of my address to you, and it is really not an argument, I don't feel that an argument is necessary, I just want to review these facts with you, and that is the question why? Now, that is always asked in a case because it has some bearing upon the motive. Why was the application made out this way? I am not going to tell you or make any personal accusations against Dr. Montgomery. Certainly the illness of his wife was something that was very unpleasant. It was something—it was a family tragedy, that is what it was. There is no question about it, the mother of two children having a serious mental illness, the children in boarding school and she having to be placed under restraint, if necessary, but we know this, and I think this is very important. The reason why the application was executed the way it was, we know from Dr. Cooney's testimony that they tried to conceal from Mrs. Montgomery her true condition. She must

have had some inkling about it. Dr. Cooney told us [179] that she made the first diagnosis herself, and she was worried about the condition that her two sisters had been in.

Now, Dr. Montgomery had the application. He took it home, and he and Mrs. Montgomery filled out the application. Is it not reasonable to assume that under those circumstances Dr. Montgomery did not want to put on the application in front of his wife the true fact that she was suffering from this mental illness? We know that they tried to keep that from her, and then when they had the application home and he was going over it, you can see the natural reluctance that he as a husband and father of her children would have to put down, say to his wife, "Honey, we have got to put down here that you have been mentally ill." He couldn't do that. That is the reason why, I submit, that was not done. There is no question that Dr. Montgomery knew that his wife, something serious was the matter with her, because his profession could not handle it. We know that he wanted to conceal it from his wife, and to do that necessarily he had to conceal it from the company because they made the application together.

Now, that being the case, we think that it is not fair; it is not just, but, to the contrary, the only true verdict that you can reach is that the material facts were withheld, were not correct, and it was done [180] deliberately. The motive for it I have tried to explain to you, and I think that is a reasonable motive to take, but, certainly, the company

should not be held responsible because the company did not know of her true condition, and the company would not have issued a policy. When the true facts became known, a refund of premiums with interest was made, and I think that is just where we ought to leave it.

This is an unfortunate family tragedy, but it is something that the company should not be compelled to pay because it did not know the facts, and the reason it didn't is because, I submit, that the doctor did not want to fill out the application with his wife and have it down in black and white in front of her that she was suffering from this serious mental illness of which there is no dispute whatsoever. Thank you.

The Court: Mr. Davis. [181]

Mr. Davis: If your Honor please, ladies and gentlemen of the jury, during the course of this trial I felt it, and I am sure that you felt it—there are two things that I felt, but one of them was this, that we were on the defensive some way. How we got on that defensive I don't know, but when we filed this lawsuit it was filed in court, and the answer set up and the issues brought up, and we were the plaintiff. You have been on juries before where the plaintiff goes ahead with his case, and he takes the offensive in the case, but in this case it has now developed so that there is the admission of an insurance policy, there is the admission of everything. There is the admission of accidental death. Everything has been admitted, and based upon that, the insurance company takes over the

burden. Judge Solomon is going to instruct you on the burden of proof and the duties of doctors, but yet, as I have sat here and the witnesses have all come in here, suddenly they were coming for the insurance company, and I felt that we were on the defensive. We are not on the defensive, ladies and gentlemen; we are not on the defensive at all. We are still on the offensive. We feel we are right, and that is why we brought this action up in court, suing for this insurance policy. I believe that you all agree that we have the right to do it if we feel we are right, and if we are wrong you are going to tell us. [182]

That is one feeling I have, and another feeling is this, and I couldn't quite determine what it was but there seemed to be something lacking, something—well, I don't know, I think of the word "cold" and no warmth to it, no personality to this case. Something was lacking, and I couldn't figure why, but do you realize, I think this will be the only case you will ever sit on that all the witnesses including the depositions, all six witnesses were doctors. I am not critical of doctors. I haven't any criticisms at all, but doctors deal in life and death. Everything is a matter of fact to them when they talk about things, but we feel a certain amount of warmth to it. The doctor takes it as a matter of fact.

On the witness stand I believe that every doctor and everybody has testified truthfully here to the best of their ability, but they were talking to you and they were talking to me in a field like, well, this was not a nervous condition or this was not from

the central nervous condition, this was an organic thing, things of that nature, and I think for that reason there was a sense of frustration as far as I was concerned, and I think you noticed it in my examination and the impatience I had to show to you that we are right.

Those are two things, but I want to get down to what Mr. Gearin has said, that he feels the reason why [183] this policy was filled out falsely, the Court will instruct you it has to be wilfully false; it has to be a deliberate intent to defraud this insurance company and something that we have done wilfully, wrongfully, or so recklessly as to be wilfull or wanton.

Put yourself in the position of, I think, Dr. Dickel. In my opinion, he testified that if he was filling out this application form what he would have done himself personally as a psychiatrist, what he would have filled out, and when you go to the jury room I wish you would look at these and study them. Look at this insurance policy. This is not just an ordinary life insurance policy. It is a policy which has a Twenty Pay Life, and I think all of you know what that is, and there was a retirement feature, a program that is something—you will notice up there the amount; you will notice the premium that was paid for it. It was based on twenty years paid up, on twenty years retirement basis. It was not a straight life like we think of a straight life insurance policy. The reason I bring that up, why take out that policy if you are going to wilfully intend to defraud the insurance company?

Why not just take out a straight life insurance policy if you are going to do that? When you take this policy in with you and these applications with you which are attached to the policy, you will notice when you look this policy over [184] on the second page where it says, "Entire Contract," I would like to have you read that. Take this application form that was filled out by Mrs. Montgomery and the doctor, and you have heard it many times. We have talked about it many times and we have gone over it many times, but this application form, it involves basically this one point up here which lists the various elements under one section——

The Court: I have a telephone call from Los Angeles. Is there any objection if Mr. Davis talks without my being present?

Mr. Gearin: I would prefer to have the Court here.

The Court: All right.

(Short recess taken.)

Mr. Davis: Mr. Gearin has said he couldn't hear me, and I may speak up a little louder just for Mr. Gearin's benefit, but I wanted you to look at this application form. We have talked about it a great deal, and I want you to do just exactly as Dr. Montgomery and Mrs. Montgomery would do, to put yourself in the same position. I do not want you to think that I am quibbling with words or quibbling with anything. I just want to have you look at this application form and see if Dr. and Mrs. Montgomery did something that was wilfully false with an intent to deceive this insurance com-

pany. Right under here they have [185] underlined nervous prostration. You have seen it, and you will see it underlined here. They put the word "No" down. Well, you don't want to admit to having epilepsy, syphilis, mental derangement and everything else. They have underlined that, and they brought it to the attention of the insurance company, and there it is, nervous prostration.

Dr. Dickel himself, who is a trained psychiatrist, who had seen Mrs. Montgomery and had gone through the records, said that if he was doing it personally himself he would mark nervous prostration, and I leave it up to you what you would have marked or what you would have done to bring it to the attention of the insurance company.

Down in here they mark the words "nervousness, two years ago." Now, actually, ladies and gentlemen, it had been three years and six months before, and the longer you have been out of treatment or the longer you have been out of a hospital the better risk you are for the insurance company. It is a better risk. I realize that; we all realize it. An insurance company couldn't cover everybody that had cancer. They can't do those things. It's a question of risk that is involved. It is a question to avoid people from deliberately, as Mr. Gearin said to you, a person that is dying of cancer, their first thought is to protect the family, [186] and a man that knows he is dying of cancer may go on and do it to try to protect his wife. They are not entitled to have insurance coverage at that time. We all know that, but did Mrs. Montgomery—did they feel, was

there any contention that she was a bad insurance risk? Did they do anything deliberately, or did they do anything wilfully? Did they intend, and did they know that Mrs. Montgomery was going to lose her life in an accident? Did they know any of these things? Was it a question of defrauding the company? It is a question of risk.

It says here two years ago, and if they had put three and a half years ago like it would have been, she would still have been a better risk, but they put two years. I don't know why unless this, that she had made a good, an excellent recovery. It says, "Results," and Dr. Joseph Cooney it says under, "Name of attending physician." It doesn't say, "Name the attending physician and name all the consultants." It says, "Name the attending physician," and if they want to check with Dr. Cooney or ask him about this, there it was.

Now, if they wanted to defraud this company, if they did this deliberately and wilfully, like the Court will instruct you, why even put nervousness down or why even mark nervous prostration or why even put Dr. Cooney's name there. They don't know whether they [187] would have contacted Dr. Cooney. The hospital records are there. There isn't any place in this application that says, "Have you been depressed within the past ten years?" There is nothing in here.

Now, the next question that they ask is this, and I want to read it to you, it is right underneath this part where they filled in the nervousness: "Have you ever had or been advised to have a surgical

operation or have you ever consulted any physician for any ailment, not included in the above answers?" They put it down there, ladies and gentlemen. It is our contention that they gave full notice to this insurance company. If you do not think so, then we are not entitled to a verdict, if you think we have done something that has been wilful and wrong, but I don't want you to get the feeling that we have been on the defensive, it is not right, but I have gotten that feeling just by — Mr. Gearin has done a wonderful job in the presenting of this case to present us as if we have done something wrong to be here in court. I do not think that is right, and that is why I want you to look this over and study it.

This insurance company made no effort to check with anybody. They didn't check with Dr. McGee, with Dr. Cooney, or anybody else. They just said, "No, we are not going to pay this client." [188]

Dr. McGee filled this out, that portion here. Did Mrs. Montgomery, did Dr. Montgomery know she was going to die in an accident? Did they expect her, that she was going to have a short expectancy of life? Does it mean that every person that has had a nervous breakdown or a woman that has had trouble, does that mean that her span of life is limited? Does that mean that every person in the insane asylum will never get well? Does that mean that their risk is extra and any woman because she has had shock treatments she is through for life; she cannot get insurance? I don't think so. I don't think Dr. Lee from Denver, who was a physician

and surgeon of the corporation and naturally has an interest, would say that. He agreed in his deposition that he couldn't say it was mental derangement or nervous prostration. He said he couldn't say, but yet what they want you to do, to put down mental derangement here when they know she was not mentally deranged. It was not an organic thing.

Do we have a duty, ladies and gentlemen, to write back here, write a letter and say, "My wife was in the hospital for two weeks. She had had a nervous breakdown, and she had had shock treatment?" The Court will say there is no duty except to fill out this application as honestly and as truthfully as you can. If we did not do that, we are not entitled to recover. We should [189] not be in court. But I say this, that, in my opinion, after you have looked this over, that the insurance company has acted arbitrarily, and they have refused to pay something because their application probably is not appropriate. If they would put in here, "Was there a diagnosis or a possibility that you have schizophrenia, paranoid," do you think that Dr. Montgomery would have not put that in? Why did he want this policy? What was the purpose of it? The purpose was not for her death, to be unjustly enriched because he had knowledge that nobody else knew about. That was not the purpose of it. You read this policy, and you will understand by that.

It is an unfortunate tragedy. It may be that you are not satisfied, and all I can say that I felt about the doctors, all I can say is this, that, as I said before, if you had to be in court yourself and you

had to go through this when you feel you are entitled to it, maybe altogether you would not be the best witness, and I feel the doctors in a way, in going over this whole case, I don't know if they described it to you or not, but I can say that Dr. Dickel in his fairness and in his honesty and what he knew about it, I think he told you the story.

We have the policy, but I don't mean to argue. You have heard all of that. Mr. Gearin will have a chance to answer all my arguments. I know he will do an [190] excellent job, but I still hope you will feel we are in court and have the right to be in court and why we feel that the insurance company has the duty to pay this claim. Thank you.

The Court: Mr. Gearin. [191]

Mr. Gearin: I am going to answer very briefly the argument that Mr. Davis has made to you.

First of all, he mentioned the witnesses. The witnesses were practically all called by us because we wanted the full facts to be brought before the jury. The only doctor witness we did not call was Dr. McGee who did not make the neurological examination, did not make a mental examination, and could not remember, because of the passage of time, questions and answers that were made and conversations that he had with Mrs. Montgomery. The witnesses do not belong to anybody. You are to decide this case on all the facts from both sides fairly and impartially.

Mr. Davis complains that there was no warmth in this case. We are asking you to decide the case not upon any feeling of warmth because the sym-

pathies anyway are all with Dr. Montgomery even if it were not for the fact he was sharing on the insurance policy. We are asking you to decide this case on the cold facts impartially and without any warmth of feeling, passion or prejudice for or against an insurance company or corporations or defendant's ability to pay or anything like that. We ask that you decide the questions that will be propounded to you coldly, impartially, and fairly.

Now, about Dr. Dickel. Dr. Dickel was a trained [192] psychiatrist. Certainly, since he admitted that the lady had a mental illness, he certainly would have put something down in the application to put the company on notice. He certainly would have told about the doctors because one of the questions that you are going to have to ask is the question which calls for the doctors that the applicant has consulted, not treated. You will find the word "consulted." That is what the company wants to know. For example, Dr. Burke was the attending physician for a year when Dr. Cooney had his heart attack. Dr. Coen was the only doctor outside of Dr. Dickel—neither of their names were mentioned—who treated the lady in the hospital. They had sole care of her. We were not advised of that. Now, if it was nervous prostration, if it was, they answered No to the question. If it wasn't nervous prostration, we have asked, "Have you consulted any physician for anything that you have not told us about before?" And the answer is No, plain and simple. It is a No answer. For example, the question 27: "Have you had or have you ever been told you had

or have you ever been treated for—" and they list epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells. The answer is No. They could have put Yes, nervous prostration. They say in the next question Nervousness. Is this [193] nervousness? We all know that people get nervous, but nervous people don't have some serious mental illness that requires hospitalization and attention of Dr. Coen and Dr. Dickel.

Next: "Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not included in any of the above answers (if yes, give full particulars)." They could have written there Holladay Park Hospital; yes, Dr. Coen; yes, Dr. Dickel.

Next question: "Are there any additional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the company should be advised?" Dr. Montgomery is a doctor. He is entitled to practice in this state. He is a doctor. Is this so commonplace, is this so frequent, as counsel would have you believe, that it is something like having your tonsils out, appendix, something like that? No. This was serious, so serious, again I repeat, that Dr. Cooney and Dr. Montgomery felt it was entirely beyond their ability as physicians and surgeons to treat her. She had to go to a special ward in the hospital. The company, I think you will all agree, has the right to choose who it will insure and who it won't. I mean that is a personal matter. You pay a premium, and the agreement is if something [194] hap-

pens to you you are going to get $30,000. The company has a right to accept you or reject you. It is the same way that you want to go and buy a radio or television set, you can go down and buy it if you want to. The company has the right to accept you as an applicant for insurance if you answer these questions. They have a right to rely upon the answers that the applicant makes, and we are criticized because we didn't go and check with Dr. Cooney. According to the application, there wasn't anything that would affect the risk, and Dr. Lee told you that. He said on this everything appeared to be in order, and one of these, it said nervousness before and after surgery, but lots of people are nervous before they are operated upon, and lots of people are nervous after, but we are not even talking about that. We are talking about what Dr. Dickel admitted was mental illness. That is what we are talking about, and the company has the right to be fully advised, and the applicant is under an obligation to lay his cards on the table and say, "Well, I think I am in pretty good shape. I think you ought to know this." It is not being unfair to require that the applicant make a full, honest, and open disclosure. They don't claim any mistake or anything like that. They said, "We said Nervousness." That includes a serious mental illness, has been diagnosed as schizophrenia, paranoid, which is [195] serious, and it is something that does not happen to many people, and it is something which we feel in all honesty that they should have told the company about.

Thank you very much. [196]

Instructions to the Jury

The Court: Ladies and gentlemen of the jury:

Unlike most of the cases in which you have sat as jurors, you will not be called upon to return a general verdict either in favor of the plaintiff or the defendant, but you will be called upon to answer certain interrogatories that I propose to submit to you.

As I told you at the commencement of this trial, the insurance company admits that it issued the policy, but it claims that it is not liable thereon by reason of certain false statements made by the deceased and her husband, the plaintiff in this case, in their application. Therefore, the defendant insurance company has the burden of proof; that is, it must prove the various questions that I will propound to you, by a preponderance of the evidence.

Preponderance of the evidence does not mean the greater number of witnesses but the greater weight and the convincing character of the evidence that is introduced. In other words, you are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your mind, as against the lesser number or against a presumption of law or evidence which satisfies your mind. The direct testimony of any witness to whom you give full credit and belief is [197] sufficient to establish any issue in the case. Every witness is presumed to speak the truth. This presumption, however, may be overcome by the

manner in which he testifies, the character of his testimony, or by evidence affecting his character or motives or by contradictory evidence. If you find that a witness has testified falsely in any one material part of his testimony, you should look with distrust upon the other evidence given by such witness and, if you find that any witness has wilfully testified falsely, it will be your duty to disregard entirely all evidence given by such witness unless it is corroborated by other evidence which you do believe. The testimony of a witness is said to be corroborated when it is shown to correspond with the testimony of some other witnesses or comport with the facts otherwise known or established by the evidence.

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. An exception to this rule exists in the case of an expert witness. A witness who, by education, study and experience, has become an expert in any art, science or profession, may state his opinion in a matter in which he is versed and which is material to the case, and he may also state the reasons for such opinion. You should consider each expert opinion received in evidence in this case and give [198] it such weight as you think it deserves. Such opinion will be judged upon the same basis as you would judge the opinions of lay persons who have testified, except that you are entitled to give it more weight if you decide that, because of the experience and training of the expert, his opinion is more likely to be accurate than that of an untrained per-

son. You may reject the opinion of an expert witness entirely if you think the reasons given in support of it are unsound.

Any fact in the case may be proved by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly without any inference or presumption and which, in itself, if true, conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eyewitness, that is direct evidence. Of course, you have evidence of that kind in this case. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another and which, though true, does not in itself establish a fact but affords an inference or presumption of its existence. That evidence is also before you in the exhibits and in the testimony of the doctors given concerning the condition of this woman, the treatments that were given. You also have that kind of evidence. It is, however, indirect evidence. Sometimes, [199] indirect evidence may be stronger, on account of the inferences which may be drawn from it, than the testimony of eyewitnesses.

You should look with caution upon the oral admissions of a party as that kind of evidence is subject to mistake. The party himself may be misinformed or may not have clearly expressed his meaning, or the witness may have misunderstood the party.

You will have with you in the jury room these interrogatories. As I have said before, these interrogatories are to be answered honestly and fairly,

without sympathy, bias or prejudice either for or against the plaintiff or the defendant. You are not to figure out on the basis of these interrogatories how they will affect any judgment that might be entered. The interrogatories read:

"We, the jury, make the following answers to the special interrogatories submitted to us relative to the application filed by Anna Grace Montgomery with the Bankers Union Life Insurance Company": Interrogatory No. 1, and that is in the center of the page, as follows: Item 27 which was taken from the policy and reads:

"Have you had or have you ever been told you had or have you ever been treated for:

> '(e) Epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, fainting spells? No.'" [200]

Then you are asked to answer these questions Yes or No:

"Was such answer wilfully false?" Answer Yes or No.

"Was such answer material?" Answer that one Yes or No.

"Did the defendant rely on it?" Answer that one yes or no.

The questions contained in the application, that is, "Have you had or have you ever been told you had or have you ever been treated for: And these lists of items as well as the other statements appearing in the application about which you will be asked, these questions or statements contained in the application must be given their natural and

normal meaning. However, if there is any ambiguity in the meaning of any question or statement, that ambiguity must be resolved against the insurance company because it is the insurance company that prepared the application. Likewise, words and statements susceptible of two reasonable constructions should be given the one most favorable to the applicant. However, this rule of construction only applies to statements or questions that are ambiguous or not clear. Do I make that perfectly clear to you? If the statement is clear, you will give it its natural and normal meaning. If the statement is ambiguous or [201] is susceptible to two reasonable constructions, you give it the construction most favorable to the insured. That is, you construe it against the insurance company.

It was the duty of all applicants for life insurance or health and accident insurance, including the insurance that was applied for in this case, to truthfully and completely answer all questions contained in an application for insurance. In this case, the evidence is uncontradicted that the plaintiff, that is, Dr. Montgomery, is an osteopathic physician and was the husband of Anna Grace Montgomery, the applicant for the insurance, and that they jointly prepared the application. Therefore, not only must the answers truthfully and completely set forth all information requested of her in connection with this application, but it must also truthfully and completely reflect all the information of which the plaintiff, himself, had knowledge at the time of the application.

Plaintiff, that is, Dr. Montgomery, and his deceased wife were bound not only to state truthfully what she, in fact, represented, but they were also obligated not to suppress or conceal any of the facts within their knowledge which materially qualified the statements made, for under the law a partial disclosure of facts accompanied by a wilful concealment of qualifying facts is not a true [202] statement in these questions, we asked in most of them was the answer wilfully false. In one of them we merely asked was the answer false.

I want to define the word "wilfully" to you. A statement is made wilfully false if it was untrue when made and was known to be untrue by the person or persons making it or causing it to be made, and if the statement was made deliberately and of one's own choice. A statement is also made wilfully false if made recklessly without regard to whether the statement is true or false, and if such statement is, in fact, false.

These are the rules by which you are to determine the Interrogatory No. 1 which I read to you, and they are also the rules which you are to use in determining your answers in Interrogatories No. 2, 3, and 4 which I will now proceed to read for you.

Interrogatory No. 2, the statement is:

"Name below all causes for which you have consulted a physician or healer in the last ten years; give details: (Include also particulars of any 'Yes' answer to question 27.)"

I might also instruct you that you are to consider

these questions in relation to each other, but each question is to be answered separately although some of the evidence which may affect one set of [203] interrogatories may also affect another set of interrogatories. I will not read the answers to that statement No. 27, but I merely want to say that you are going to be asked three questions there again: Was such answer wilfully false; was such answer material; and did the defendant rely on it.

Interrogatory No. 3 says:

"Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment, not included in any of the above answers?" The answer, as you recall, was "No." You are asked to answer four questions: Was such answer false; was such answer wilfuly false; was such answer immaterial; and, did the defendant rely on it.

Then Interrogatory No. 4, the statement is:

"Are there any adidtional facts or special circumstances known to you which might affect the risk of insurance on your life, and of which the company should be advised?" The answer there was "None." You will be asked those three questions: Was such answer wilfully false; was such answer material; did the defendant rely on it.

In the Federal Court all answers must represent the unanimous opinion of each of the jurors so I want to admonish the foreman, whoever he or she may be, to make sure that each of the answers represent the unanimous [204] opinion of each of the jurors.

I urged you before not to talk about this case with anyone else and not to discuss it with anyone, even among yourselves, until the case is submitted to you. That time is about here, and, of course, we expect you to discuss each interrogatory fully and give it such answer as you believe is right and just under the evidence submitted in this case.

I think some of you have sat on juries before when I have told you it is usually better not to go into the juryroom and announce emphatically that, "I am for all Yes answers," or, "I am for all No answers," and, "We are going to decide this case for the benefit of the insurance company or for the benefit of the plaintiff and let's figure out how these things can be done," but it is usually better not to make an emphatic announcement right away because, under those circumstances, individual pride may cause one to be reluctant to recede from a position which that juror has emphatically announced. So the only thing I tell you is discuss the matter and keep an open mind, and on the basis of your discussions and the evidence come to correct verdicts. What you find is correct obviously will not satisfy both the plaintiff and the defendant, but that is not your responsibility. Your responsibility is to make a decision [205] based upon my instructions and the evidence.

Are there any exceptions to the Court's statements?

Mr. Davis: No, your Honor.

Mr. Gearin: No, sir.

The Court: I asked you here, but if you want

to make exceptions you can do it outside in view of the fact that we had discussed this matter before.

You will have with you not only this form of verdict, but you will have with you the exhibits in the case. Swear the bailiff.

(Bailiff sworn.)

The Court: In view of the length of these interrogatories, do either of you have any objection if I give them an extra copy to go into the jury room?

Mr. Gearin: No, sir.

Mr. Davis: No.

(Thereupon, at 11:10 A.M., the jury retired to the jury room for deliberation.)

(The jury having retired to the jury room, the following proceedings were had:)

The Court: If there are any exceptions, we will hear you now.

Mr. Davis: The only one I had, your Honor, I took [206] last night—I presume that is for the record—was the Court submitting the interrogatories, and then my only thought was this, your Honor, that the Court did submit the interrogatories and then tied the instructions in with the interrogatories, and if the Court would permit me an exception to that.

The Court: Certainly, you may have your exception. First, you are again excepting to the fact that I am submitting interrogatories rather than a general verdict?

Mr. Davis: Yes, sir.

The Court: Secondly, you are excepting to the fact that I discussed the instructions in relation to the specific questions in the interrogatories?

Mr. Davis: Yes, sir.

The Court: You may have your exception.

Mr. Gearin: I do not make any objection to the Court's instructions; however, I think I indicated to your Honor last night that it is the position of the defendant that there was no issue of facts to be submitted to the jury, one or any, with regard to the materiality of the answer or the reliance of the company thereon, and probably that will be moot by whatever answers are given, but it may become important, your Honor.

The Court: It may because this jury, I might tell you now, answered interrogatories of this kind, almost [207] identical interrogatories, in connection with another insurance case, finding the answers given but that the company did not rely on them. They found that the questions were given; that they were not material, and that the company did not rely on them.

Mr. Gearin: Well, I want to protect my record.

The Court: Yes, you can protect your record. There is basis for your inquiry.

Mr. Davis: Mr. Whitely mentioned to me, I am sure there is a record of it, and that was the Court permitting the defendant to open and close the argument.

The Court: You have already had that. You do not have to take that now.

(Trial concluded.)

(At 3:00 p.m. the Jury returned with its verdict, and the Court having received the verdict and the Jury having retired, the following proceedings were had:)

The Court: Judgment may be entered on the verdict, and I am going to allow you $5000.00 attorneys fees. Pursuant to the stipulation, I can do that without either evidence being taken or another motion. [208]

[Endorsed]: Filed Feb. 24, 1958.

[Title of District Court and Cause.]

TRANSCRIPT OF PROCEEDINGS IN RE: DEFENDANT'S MOTIONS TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL

Portland, Oregon, December 23, 1957.

Before: Hon. Gus J. Solomon, District Judge.

Appearances: Mr. Alan F. Davis, of attorneys for Plaintiff. Mr. John Gordon Gearin, of attorneys for Defendant. [1]

The Court: Mr. Gearin.

Mr. Gearin: This is a motion of the defendant, your Honor, first for judgment notwithstanding the verdict. In this case, your Honor, before the trial we submitted a memorandum authority to the Court, relying chiefly upon the Chandler case and upon the Comer case. I am satisfied that your Honor gave consideration to those, and we feel that

there is no other authority in this matter that we can give to the Court on that score. Suffice it to say, your Honor, that the credible medical testimony in this case disclosed affirmatively that Mrs. Montgomery had a mental illness. That is the testimony of the psychiatrist who attended her; that she had been confined to a hospital on two occasions, and she had been diagnozed as schizophrenic paranoid. The record further discloses she was taken on one occasion by ambulance to the hospital and that the hospital records indicate that in addition to sedations she was to be placed in restraint, if necessary. This indicates affirmatively a mental illness and cannot be considered, I do not believe, as a matter of fact, any condition of nervousness. I don't believe that the facts as shown justify the jury in returning that finding.

We know what the law is, and long argument would serve no purpose because I know your Honor has read the decisions, [2] and the evidence is without dispute as to the nature of the mental illness.

However, with regard to the alternative motion, and this is directed primarily to the discretion of the trial court, this, I believe, your Honor, is a case in which the jury went off the deep end and a case where it is obvious to all concerned. The plaintiff himself who was a doctor of some sorts, and I don't mean that disrespectfuly, but his medical past was not in the field of psychiatry. He knew that her condition was such that neither he nor Dr. Cooney could treat it, and that is why she was confined to the hospital with this mental ill-

ness, and there is no question that it was a mental illness and not nervousness.

I think the verdict was against the greater weight of the evidence. It was something that I know came as a shock to me. I think it something that no person unless he were inflamed against the defendant or had some idea—I will come to the questions of specific errors in the admission of testimony later—that this could not have been fairly done because people know as a matter of common every-day knowledge that mental illness is something different and apart from nervousnss. All human beings are to some extent suffering from nervousness, and I don't think you can make [3] the same statement with regard to a mental illness which has been diagnosed here again in medical terms as schizophrenia, paranoid type.

Now, we have in this case, your Honor, three contentions; one, Dr. McGee was permitted to testify, over our objection, that he knew that Mrs. Montgomery had been confined to the Holladay Park Hospital. That testimony, because of the nature of the pretrial order and counsel for plaintiff's statement to the Court that he was not relying upon estoppel or waiver and was not contending that the knowledge of Dr. McGee would be imputed to the plaintiff, permitted—the evidence was brought to the attention of the jury that the company's examiner knew that she had been to the hospital where they have a psychiatric ward when it was not material to the issue. It had nothing to do with the question and answer, and, therefore,

we think that the jury might well have thought, "Well, the company knew about this, and they are just talking about something at the last minute to defeat the claim."

There is one statement in my motion, your Honor, that I wish to withdraw. That is the statement that the knowledge of the insurer's agent acquired outside the scope of his agency is not imputable to the principal. In checking that further, I find that Oregon subscribed, unfortunately, to that majority rule. Therefore, I withdraw [4] that statement as an incorrect statement of the law. However, the testimony was immaterial for the reason I have stated because there was no claim made that the company knew of this condition; therefore, the jury was permitted to have that, and I think that is one of the reasons that perhaps led the jury to feel that, well, the company knew about this anyway, and it is not very important.

Secondly, Dr. Dickel was permitted to testify as to the answers which could have been made to the questions. Now, Dr. Dickel as a psychiatrist and as an expert witness could testify to what in medical language he terms nervousness, nervous breakdown and nervous prostration as one of the terms, and I don't know the others—mental illness or the other, but I think the jury should not have been permitted to hear his testimony as to what answers should have been given because if as a lay person that would have invaded the province of the jury, and your Honor so instructed them, but, as a psychiatrist, how he would answer that certainly was

immaterial and it probably misled the jury into thinking that, well, that is the answer that should have been given anyway.

The third point of our motion where we think that we should have had this before the jury, and the Court excluded our offer of proof of Dr. Dickel when he was here— [5] it was our offer of proof, excuse me—we had supposed that the records of Dr. Coen which were exhibited, were exhibited to them first before I had an opportunity to look at them; nevertheless, while they were records maintained in the course of business, that they were the official records maintained by Dr. Coen when he was here, and I think they should have been received in evidence, your Honor, as part of the Shop Book Rule. However, I will say this, that they were not marked as an exhibit; however, I checked with our Reporter a day or so after the trial, and the record discloses that at the time I offered them into evidence I asked that they be marked.

Now, I think on those three grounds, your Honor, the jury got hold of something that probably led to that result, and I appeal to the discretion of the Court because I think that this was a thin case. It is a case where I do not believe, in just looking at it, you can say this is the meat of the coconut, and you can say that nervousness describes a condition of schizophrenic paranoid, particularly when there is a medical person on the part of the plaintiff, and, certainly, he had some knowledge of those facts so he and Dr. Cooney would know she had been confined to a psychiatric ward. [6]

The Court: Mr. Davis.

Mr. Davis: If your Honor please, I don't want to get into the law of it because I know the Court knows the law.

Of course, it is plaintiff's contention that the Chandler case and the Comer case are not in point. I think the broad field of the law was the notice to the insurance company, and the insurance company had notice of it. There was no concealment of it. The interrogatories submitted to the jury were answered by the jury to that effect, and I believe that those interrogatories were the answers to the jury's findings of facts, and that is the way they found it.

With regard to Dr. McGee, as we advised the Court, we were not coming under a theory of estoppel nor waiver, but the defendant used Dr. Lee who was the doctor for the insurance company, and in his deposition he testified that this woman, so far as he was concerned, in 1954 at the time the answers were filed to the application, she was in bad health, and they would not have covered her. Dr. McGee testified that in his opinion she was in good health when he examined her, that he had knowledge of the condition, but his testimony was that, as far as he was concerned, she was in good health. They submitted the evidence through [7] Dr. Lee that she was not in good health. Now, if she had been in good health is another question for determination. Dr. McGee was the doctor for the insurance company that examined her. The Court gave the right to the defendant to go into his

testimony, and that was the right that the defendant could have exercised on the question of collusion if they wanted to do that.

With regard to Dr. Dickel, your Honor, the question was this: the answer was either mental derangement or nervous prostration. The notice was given to the insurance company of nervous prostration, and Dr. Dickel and the rest of the doctors said that she was not mentally deranged; it was an organic—that if she was mentally deranged it was an organic thing. Dr. Dickel went into it thoroughly. The question was this, was what was the trouble that she had? They marked it nervous prostration. It was up to the insurance company if there was some other thing they should have underlined or something of that nature that came within those two fields. Dr. Dickel's testimony was that she was not mentally deranged; it would come closely to that of nervous prostration, and that is what they did in giving notice to the insurance company.

I know that the Court is familiar with all of the law cases, and I do not want to go into them, but the jury held [8] there was not any false statements wilfully given or any false statements that were given.

The Court: What about Dr. Coan's records?

Mr. Davis: Dr. Coan's records, your Honor, let me say this. Dr. Dickel was called by the defendant as their witness, and he had his records with him at that time. He was put on the witness stand, and I cross examined Dr. Dickel, and then I made him

a witness. The records were those that were maintained, and as I can recall, I am not sure, your Honor, but as I can recall, in making Dr. Dickel my witness I asked him to refer to the records, and Mr. Gearin objected to them, that they were Dr. Coan's records and that they could not be used for the purpose of testimony, and as I recall, the Court sustained the objection, and then it was on cross examination that Mr. Gearin asked Dr. Dickel for the records and looked through them, and then offered them into evidence. The Court at that time asked if I had any objection, and I believe, as I can recall, that I thought they were of no value since they were Dr. Coan's records. Now, I don't think that they were proper, and I know the Court sustained an objection of Mr. Gearin when I asked him to start referring to them.

Mr. Gearin: Your Honor, first of all, three matters I want to cover briefly: one, counsel has said that the [9] testimony of Dr. McGee about going to the question of notice, that was not an issue in the case according to the issues to be determined, and we discussed this matter prior to the trial in Chambers, if your Honor will recall when that—or did the insured, Anna Grace Montgomery, and the plaintiff make misrepresentations of fact to the defendant—the question of notice was not in the case; secondly, the question of good health. If Dr. McGee had testified as to the good health, that was one thing, but the testimony elicited by Dr. McGee went through that, and it went to his notice of his knowledge of her condition which again was not

an issue in the case, and his testimony was not very informative. Thirdly, Dr. Dickel was made a witness of the plaintiff. You will recall that I asked certain questions, and then I stopped, and then we had some colloquy between Counsel and the Court in which we said that to save time let the doctor testify as their witness after he had identified—and then after he had identified the records on cross examination I then made my offer of proof.

The Court: I don't think that the Chandler case is controlling here for the reason that the jury found that the names of the doctors were divulged. You cannot consider [10] the Chandler case in a vacuum. You have got to consider it in the light of these facts.

At the outset, I want to say if I were to decide this case I would have decided it in favor of the defendant but that is why people ask for juries because they may not agree with what I would find.

It seems to me that this case was decided on the theory of the construction of the words used by the company itself. The company had certain words: "Have you ever had a nervous breakdown, nervous prostration, or mental illness," and the words "nervous prostration", I believe, had been underlined, and then it was later explained with the name of the attending physician, and all people seemed to agree that Dr. Cooney was the attending physician. If it was a matter of first impression, I would say that he was not the attending physician because Dr. Coan seems to be the attending physician. He is the one who treated her, but the

defendant's own evidence indicates that Dr. Cooney was the attending physician.

Mr. Gearin objects to the statement, the testimony of Dr. Dickel as to what he would underline. He is a psychiatrist. I would not hold the general public up to the same standard as I would Dr. Dickel, but what the defendant is trying to do is to say that a layman should [11] be brighter than a psychiatrist because a psychiatrist would not have said that that was a mental derangement, and he thinks that the average insured should do so.

With reference to Dr. McGee, it is true that his knowledge was not notice to the company and I denied the admission on that basis, and I told you at the beginning of the trial that I would not let it in on that basis. I think if you had proper pleadings that you might have had a defense to the plaintiff's contentions, but you did not have it in there.

There are two cases that I told you about that would show that if Dr. McGee knew about her condition defendant might not have any difficulty at all. One is Cohn Brothers vs. Northwestern Mutual Life, and the other is Stipcich vs. Metropolitan Life Insurance Company. Both were bases upon a statute in Oregon which say that the agents of life insurance companies are agents for all purposes, but you may not have that provision in the case. But that was not the question that was asked Dr. McGee, and that was not the basis of my ruling. The question is not as posed by Mr. Gearin. The question that was asked Dr. McGee was: did

she tell him that she had been in Holladay Park Hospital, and then the answer came out he did not know whether she [12] told him at that time or whether he knew it from his own information. It was my view at that time, and it is my view now that the plaintiff was entitled to have that testimony before the jury.

If she had told him that she had been to the Holladay Hospital during that examination and he, himself, failed to put it down, that would have been an interpretation which he gave to those questions. Even though it is not admissible on the question of notice, it certainly is admissible on the question of what was divulged to Dr. McGee at the time of the examination. An insured is not responsible if Dr. McGee fails to put down all the information divulged to him, and that was the basis upon which I decided that the testimony of Dr. McGee was admissible.

To clarify, further, he didn't know whether she had told him or whether he had known it from prior information.

Now, with reference to Dr. Coan's records, I thought there was no question about my ruling. You, Mr. Davis, had attempted to have Dr. Dickel use those records. [13] Then I said you cannot have your cake and eat it too; you will either have to let the records in or you cannot have them examined, and I sustained Mr. Gearin's objection to that testimony. Dr. Dickel had testified that he had never made any examination of this woman except on one or two occasions during Dr. Coan's absence

when he came over to the hospital and he looked at her, but these were not Dr. Dickel's records. There was no testimony that they were kept under his direction. They would have been admissible had Dr. Coan had these records and had been asked about them, but they were not.

I think that there is a vital error in the objection because no offer of proof was made as to what would have been proved. I think that you were trying to get in a letter to Dr. Montgomery, but that was because something else happened. I do not know whether it could have been admitted. I don't know how Dr. Coan could have testified that the letter had been mailed to Dr. Montgomery.

This looks like a close case on some of the points, but in view of the jury's findings and in view of my belief that this case does not come within the reach of the Chandler and Comer cases but more properly comes within those other cases, the motions must be denied. There are many cases in the Oregon cases which deal with [14] the interpretation of policies and the interpretation of applications, and I think that this is one of such cases.

For that reason, all of the motions will be denied. [15]

[Endorsed]: Filed March 4, 1958.

Policy Number [illegible]-D SPECIMEN Amount $ [illegible]

Age 35 Annual Premium $ [illegible]

BANKERS UNION LIFE INSURANCE COMPANY

DENVER, COLORADO

Old Line Legal Reserve Life Insurance

Hereby Agrees to Pay

[illegible] FIFTEEN THOUSAND AND [illegible] [illegible] DOLLARS
(The Ultimate Face Amount of This Policy)

together with any outstanding dividend additions and or accumulated dividends standing to the credit of this policy, upon receipt of due proof of the death of

[illegible] ANNA GRACE [illegible], the Insured, to

JOHN LYLE MONTGOMERY, HUSBAND
[illegible] FIRST BENEFICIARY [illegible], Beneficiary.
(SEE APPLICATION)

with [illegible] the right on the part of the Insured to change the Beneficiary in the manner hereinafter provided.

DIVIDENDS

THIS POLICY SHALL PARTICIPATE IN ALL OF THE PROFITS OF THE COMPANY, composed of (1) Savings in Mortality, (2) Interest in Excess of Reserve requirements, (3) Profits from Lapses, and (4) Savings from Economy of Management, as set forth on the second page hereof.

Twenty Payment Life
Profit-Sharing

Accidental Death Benefit Rider

50—48—5C
CP&LC—2603

DUPLICATE

DIVIDEND PROVISIONS

ANNUAL DIVIDENDS. At the beginning of the second and each succeeding policy year while this policy is in full force, provided the premium for the current policy year has been paid in full, this policy shall be credited with such share of the profits of the Company as shall be apportioned hereto by the Company. Each such dividend, when available, may, at the option of the Insured, be either:

1. Paid in cash; or
2. Applied to the payment of any premium then due on this policy, provided the balance of the premium for the current policy year be paid in full in cash; or
3. Applied within thirty-one days from the date it becomes available, but not later, as a net single premium computed on the same mortality table and interest assumption as the reserve on this policy, to purchase a paid-up addition to the insurance under this policy (hereinafter referred to as dividend addition); or
4. Left with the Company to accumulate at interest at the rate of two and one-half per cent per annum for each full year, or at such higher rate as the Company may declare on such funds.

If no option is selected, No. 4 will be automatically effective. The selection of a dividend option may be changed by the Insured by written request to the Company at its Home Office, to be effective for dividends thereafter apportioned.

At any time while no premium is in default, the Insured, by written request to the Company at its Home Office, may withdraw the accumulated value of any dividends left with the Company under Option 4, or surrender any Dividend Additions for their full reserve value at the time of such surrender. Any indebtedness against such accumulated dividends or dividend additions will be deducted from the amount payable.

PAID-UP OR ENDOWMENT PRIVILEGE

When the Cash Surrender Value of this policy, which includes the value of any dividend additions and or accumulated dividends to the credit of this policy, shall equal the net single premium for a paid-up endowment policy maturing on the Maturity Date of this policy for the Principal Sum of this policy at the then attained age of the Insured, nearest birthday, computed on the same mortality table and interest assumption as the reserve on this policy, the Company, upon written request of the Insured and release of the dividend additions and accumulated dividends, will endorse this policy as fully paid, subject to any existing indebtedness, whereupon no further payment of premiums will be required; or when such aggregate value equals the Principal Sum of this policy, upon such request and release and surrender of the policy and all dividend additions and accumulated dividends, the Company will pay to the Insured the net cash value as an endowment.

re tract

This policy, including the endorsements printed or written hereon or attached hereto by the Company, and the application herefor, a copy of which is attached to and made a part of this policy, constitute the entire contract between the parties. All statements made by the Insured or in his behalf shall, in the absence of fraud, be deemed representations and not warranties, and no such statement shall avoid this policy or be used in defense of a claim under it unless it is contained in the written application and a copy of the application is endorsed upon or attached to the policy when issued.

rol of cy

Unless otherwise provided herein or by endorsement hereon, it is understood and agreed that the Insured shall have the right, without the consent of any beneficiary, other than an irrevocable beneficiary, to exercise every right and enjoy every privilege conferred upon the Insured by this policy.

ification

No person, except the President, a Vice-President, the Secretary, an Assistant Secretary or the Treasurer of the Company, has the power to make or modify this contract, or to change or waive any of the provisions hereof, and then only in writing. The company shall not be bound by any promise or representation heretofore or hereafter made by or to any agent or person other than the above.

ment of miums

This policy is based upon the payment of premiums annually in advance, but premiums may be paid in semi-annual or quarterly installments in advance at rates in use by the Company at the date hereof. Premiums are payable at the Home Office of the Company in Denver, Colorado, but may be paid to an authorized collector of the Company but only in exchange for the Company's receipt therefor signed by the President or Secretary and countersigned by such collector. Failure to pay any premium or installment thereof, or premium note or premium extension agreement when due and payable, shall cause this policy to cease and determine, except as may be hereinafter provided, and all payments made hereon shall remain the property of the Company.

e Period Payment remiums

If any premium or installment thereof is not paid on or before the day it becomes due, the policyholder is in default; but a grace of thirty-one days, without interest charge, will be allowed for the payment of each premium after the first, during which period the policy will remain in force.

statement

This policy, if not previously surrendered for cash, and if the extended term insurance has not expired, may be reinstated at any time within five years from the due date of any premium or installment in default, upon furnishing evidence of insurability satisfactory to the Company, together with the payment of all premium arrears with interest from the respective due dates thereof at six per cent per annum and the payment or reinstatement, with interest at a like rate, of any other indebtedness to the Company on account of this policy.

ntestability

This policy shall be incontestable after it has been in force during the lifetime of the Insured for a period of two years from its date of issue (1) except for the non-payment of premiums or installments thereof; (2) except as to the provisions of the policy relating to military or naval service; (3) except that part or parts of the policy, if any, relating to benefits in event of disability; (4) except that part or parts of the policy, if any, relating to additional insurance benefits in event of death by accidental means.

ary or l Service

Death while in military or naval service of any country in time of war, declared or undeclared, is a risk not assumed by the Company under this contract, however, this contract may be extended to cover such service upon payment of such extra premiums and such modification of policy contract as may be required by the Company. If death occurs from any cause during such service or within six months after termination of such service from any wounds, injuries or diseases received or contracted during such service, without such extension having been made, the liability of the Company under this policy shall not exceed the total premiums that have been paid to and received by the Company hereon.

tatement ge

If the age of the Insured be misstated, the amount payable under this policy shall be such as the premiums paid hereon would have purchased under this policy at the correct age of the Insured.

Destruction

In the event of self-destruction during the first two insurance years, whether the Insured be sane or insane, the amount payable under this policy shall be a sum equal to the premiums hereon which have been paid to and received by the Company, and no more.

procal isions

If this policy does not conform to the laws of the state in which it is issued, it shall be held to be modified to the extent necessary to conform thereto at the effective date hereof; any provisions hereof contrary to such laws shall be construed to be modified or eliminated to the extent necessary, and any further provisions necessary to conform to such laws shall be read into this policy.

ge of y

At any time during the premium payment period of this policy and while it is in full force and no premium is in default, and before the Insured attains the age of sixty years, it may be exchanged without medical examination for any form of life or endowment policy being issued by the Company at the effective date of this policy and having a higher premium rate and not involving any other life. Such exchange shall be made upon the written request of the Insured and assigns, if any, and any irrevocable beneficiary, and upon the payment to the Company of the difference between the premiums paid hereon and the premiums that would have been paid, if the policy had been originally issued on the new plan, with interest at the rate of six per cent per annum computed on the differences in such premiums, provided the differences in premiums and interest thus produced is not less than the difference between the cash value of the new and the old policies for the number of years premiums were paid on the old policy. If a different form of disability benefit or accidental death benefit from that provided in this policy is requested, evidence of insurability may be required.

ge of ficiary

The Insured may from time to time change any designated revocable beneficiary hereunder, unless otherwise provided by endorsement on this policy, subject to the terms of any then existing assignment. Every change of beneficiary must be made by written notice to the Company at its Home Office accompanied by the policy for endorsement of the change hereon by the Company, and unless so endorsed the change shall not take effect. After such endorsement the change shall relate back to and take effect as of the date the Insured signed said written notice of change whether the Insured be living at the time of such endorsement or not, but without prejudice to the Company on account of any payment made by it before receipt of such written notice at its Home Office. In the event of the death of any beneficiary before the Insured, the interest of such beneficiary shall vest in the Insured, unless otherwise provided by endorsement hereon.

nment

Any assignment of this policy must be made and sent to the Home Office of the Company in duplicate, one copy to be retained by the Company and one copy to be returned. The Company assumes no responsibility for the validity or sufficiency of any assignment.

ment of eeds

This policy is payable at the Home Office of the Company in Denver, Colorado. Before any amount shall be paid hereunder, proof of the interest of claimant must be furnished and any indebtedness to the Company hereon must be settled, including, in the case of a death claim, the amount, if any, necessary to complete the premium for the current policy year.

DUPLICATE

y Loans

At any time after premiums have been paid for the minimum number of years for which Tabular Cash Values are shown in the Table of Guaranteed Values applicable to this policy, and while this policy is in full force, except as extended term insurance, the Company will loan upon the execution of a proper loan agreement and assignment of this policy, and on the sole security thereof, an amount which, together with any existing indebtedness and any unpaid portion of the premium for the current policy year, shall not exceed the Cash Surrender Value of this policy at the end of such policy year; the policy must be delivered to the Company for proper endorsement. Interest shall be at the rate of six per cent per annum, payable in advance to the end of the current policy year and annually in advance thereafter; if interest is not paid when due it shall be added to the principal and bear interest at the same rate. Failure to repay any loan or interest thereon shall not void this policy until the total indebtedness to the Company hereon shall equal or exceed the Cash Surrender Value hereof, but if at any time, such indebtedness, together with accrued interest thereon, shall equal or exceed the then Cash Surrender Value of the policy, the policy shall become void thirty-one days after notice shall have been mailed to the last known address of the Insured and the assignee of record, if any, and of any irrevocable beneficiary.

matic ium Loans

If requested in the application for this policy or if a satisfactory written request is received at the Home Office of the Company while there is no premium or installment of premium in default, or within the grace period allowed for the payment of any premium or installment of premium in default, any premium or installment thereof not paid at the expiration of the grace period shall be automatically charged as a loan against the policy, with interest from the due date of such premium or installment thereof, provided the total indebtedness against the policy will then be within the Cash Surrender Value of the policy. If the Cash Surrender Value is not sufficient to permit the premium or installment thereof then due to he charged as a loan, then the Company will charge as a loan the next smaller installment of premium, either semi-annual or quarterly; provided, however, that if such value is not sufficient to permit a quarterly installment of premium to be charged as a loan, the Company will charge such fraction of a quarterly installment as such value will permit. Automatic Premium Loans will be subject to the same provisions as Policy Loans with respect to rate and manner of payment of interest, failure to repay any loan or to pay interest thereon and voiding of policy. A request for Automatic Premium Loans may be revoked by a satisfactory written notice to the Company at its Home Office, but such revocation shall not affect any Automatic Premium Loan made prior to receipt of such notice of revocation at its Home Office.

ment

The Company shall have the right to defer for the period permitted by law but not exceeding six months after request is made for any of the following: policy loans, if for a purpose other than to pay premiums due on policies in the Company; cash surrender value; cash value of paid-up additions; dividend accumulations; or withdrawal of amounts remaining with the Company under settlement options. If payment of the cash value shall be deferred for more than thirty days, interest at the rate of 2½ per cent per annum will be paid by the Company for the period of deferment.

ve Basis Net Single ium

The reserve on this policy shall be computed on the basis of the Commissioners 1941 Standard Ordinary Table of Mortality, assuming deaths occur at the end of the insurance year, with interest at the rate of 2½ per cent per annum, in accordance with the Commissioners Valuation Method. The net single premiums referred to in this policy shall be computed on the above named table of mortality and interest rate and shall be based on an attained age equal to the insuring age of the Insured at the effective date of this policy, plus the length of time from the effective date to the date as of which the net single premium is computed, the resulting attained age being taken to the nearest year.

of Tabular Value

The Tabular Cash Value of this policy per $1,000 of Ultimate Face Amount, at any time, shall be equal to the then present value per $1,000 Ultimate Face Amount of the future life insurance benefits guaranteed by this policy, exclusive of any accidental death benefits or any disability benefits which may be included in or attached to this policy, and exclusive of any benefits provided by any rider provisions which may be attached hereto, less the then present value of a life annuity of the annual amount or amounts designated as basic factors at the foot of the Table of Guaranteed Values applicable to this policy and for such period or periods as indicated.

The Tabular Cash Value, if any, on any anniversary prior to the years shown in the Table of Guaranteed Values will be calculated in accordance with the above formula. At any time other than a policy anniversary, the present values referred to shall be the interpolated values as of such date.

Calculation of the present values heretofore referred to shall be made on the basis of the Commissioners 1941 Standard Ordinary Table of Mortality with interest at the rate of 2½ per cent per annum, and on the assumption that deaths occur at the end of an insurance year.

The Tabular Cash Values under this policy are at least equal to or greater than the minimum values prescribed by the statutes of the state in which this policy is delivered and, after three full years' premiums have been paid, are in no event less than the reserve on this policy reduced by two and one-half per cent of the amount of insurance then in force hereunder.

Forfeiture

If any premium or installment thereof is not paid at the expiration of the grace period, either in cash or by application of the Automatic Premium Loan provision, the following provisions shall apply:

(a) **Extended Insurance.** Insurance for the then Face Amount of this policy plus any outstanding dividend additions and any outstanding dividends, including dividend accumulations, and less the amount of any indebtedness to the Company hereon, shall, upon the expiration of the grace period, be automatically continued from the due date of the premium or installment thereof in default, as non-participating extended term insurance for such a term as the Cash Surrender Value will purchase as a net single premium at the date of default; provided, however, that if the Cash Surrender Value is sufficient to purchase paid-up participating life insurance in a sum equal to or greater than the amount of term insurance so computed, the Cash Surrender Value shall be so applied.

(b) **Paid-Up Insurance.** Upon proper written request within thirty-one days after such default, but not later, this policy will be endorsed by the Company for such an amount of paid-up participating life insurance, payable at the time and on the conditions provided in this policy, as the Cash Surrender Value will purchase as a net single premium at date of default.

(c) **Cash Surrender Value.** If this policy shall not have been endorsed as provided in (b) above, it may be surrendered to the Company within thirty-one days after such default, but not later, for its Cash Surrender Value, which shall be the Tabular Cash Value of this policy increased by the cash value of any outstanding dividend additions, and any outstanding dividends, including accumulated dividends, and reduced by the amount of any indebtedness to the Company hereon.

Extended Term Insurance or Paid-Up Insurance, provided above, in response to the written request of the Insured, or automatically, will be without any form of Accidental Death or Disability Benefits or any Benefit or Benefits provided in any supplemental agreement attached to this policy. Extended Term Insurance or Paid-Up Insurance may be surrendered upon any anniversary of this policy, or within thirty-one days thereafter, for the net present value thereof as of such anniversary, less any indebtedness to the Company thereon.

Twenty Payment Life—Tables of Guaranteed Values

The values in these tables are computed in accordance with the provisions of this policy entitled "Basis of Tabular Cash Values" and "Non-Forfeiture," on the basis of $1,000 of Ultimate Face Amount, assuming that premiums have been duly paid for the number of years stated, that there is no indebtedness to the Company, that there are no outstanding dividend additions nor any outstanding dividends, including dividend accumulations. If the Ultimate Face Amount of this policy is greater or less than $1,000, the Tabular Cash or Loan Value and the Paid-Up Participating Life Insurance will be increased or decreased proportionately. The term of Extended INSURANCE REMAINS THE SAME FOR ANY Ultimate Face Amount.

The values in the following tables applying to this policy are those shown in the table headed by the age of the Insured at the effective date of this policy as shown on the first page of this policy. Values after twenty years will be furnished upon request.

* * * * *

Age 32					Age 33					Age 34					Age 35				
				1					1					1					1
16.54	37	3	276	2	17.07	38	3	244	2	17.58	38	3	208	2	18.09	39	3	170	2
44.30	98	8	284	3	45.32	98	8	179	3	46.33	98	8	73	3	47.32	98	7	331	3
72.66	157	12	228	4	74.17	157	12	71	4	75.66	157	11	277	4	77.16	157	11	119	4
101.61	215	15	227	5	103.61	215	15	32	5	105.61	215	14	201	5	107.60	215	14	9	5
131.18	272	18	7	6	133.68	276	17	146	6	136.17	271	16	289	6	138.65	271	16	68	6
161.39	326	19	354	7	164.38	328	19	106	7	167.37	327	18	230	7	170.35	327	17	354	7
192.24	383	21	216	8	195.73	383	20	321	8	199.21	382	20	61	8	202.69	382	19	168	8
223.75	437	22	357	9	227.75	437	22	62	9	231.73	436	21	175	9	235.71	436	20	269	9
255.95	491	24	65	10	260.45	490	23	145	10	264.95	490	22	227	10	269.42	489	21	311	10
288.85	544	25	90	11	293.87	543	24	161	11	298.87	543	23	234	11	303.86	542	22	305	11
322.49	596	26	81	12	328.02	595	25	144	12	333.54	595	24	410	12	339.04	594	23	277	12
356.88	648	27	50	13	362.95	647	26	107	13	369.00	646	25	166	13	375.02	645	24	427	13
392.08	699	28	11	14	398.68	698	27	63	14	405.27	697	26	116	14	411.83	696	25	171	14
428.11	750	28	346	15	435.27	749	28	27	15	442.41	748	27	75	15	449.51	747	26	124	15
465.01	800	29	343	16	472.75	799	29	19	16	480.46	799	28	61	16	488.14	798	27	106	16
502.85	850	31	36	17	511.18	850	30	72	17	519.49	849	29	110	17	527.77	848	28	149	17
541.68	900	32	221	18	550.63	900	31	250	18	559.57	899	30	281	18	568.48	899	29	313	18
581.57	950	34	339	19	591.18	950	33	362	19	600.79	950	33	23	19	610.37	949	32	51	19
622.61	1000			20	632.93	1000			20	643.24	1000			20	653.56	1000			20
Basic Factors	{ First 20 years, 30.73647 / Thereafter	None			Basic Factors	{ First 20 years, 31.42409 / Thereafter	None			Basic Factors	{ First 20 years, 32.11329 / Thereafter	None			Basic Factors	{ First 20 years, [illegible] / Thereafter	None		

SPECIMEN

BANKERS UNION LIFE INSURANCE COMPANY

DENVER, COLORADO

Accidental Death Benefit

Supplemental Agreement attached to and made a part of Policy No. [redacted]7211

on the life of - - - - ANNA GRACE MONTGOMERY - - - - - - , the Insured.

In the event the death of the Insured results from accidental means, as hereinafter defined, and subject to all the provisions, conditions and restrictions hereinafter contained, the Company will pay the sum of

- - - - - - - - - - - - - - - FIFTEEN THOUSAND AND NO/100THS. - - - - - - - - - - DOLLARS

in addition to any other amount payable under said policy.

The additional benefit above provided shall be payable only upon receipt of due proof that the death of the Insured occurs during the premium paying period of the policy and while said policy and this supplemental agreement are in full force and effect on a premium paying basis, before any claim has been made or allowed under any disability benefit included in or attached to said policy, and before any benefit or value (including any non-forfeiture benefit) under any provision of said policy, other than loans, shall have been claimed or allowed, or granted automatically, and before the anniversary of the policy on which the age of the Insured, nearest birthday, is sixty years, provided such death results solely from bodily injuries, received after the effective date of this supplemental agreement, and while it is in full force, and caused directly, exclusively and independently of all other causes by external, violent and purely accidental means, as a result of which (except in case of drowning, or internal injuries revealed by an autopsy) there is a visible contusion or wound on the exterior of the body, and provided also that death shall ensue within ninety days from the date of the injury and shall not result from homicide, nor be caused or contributed to, directly or indirectly, by: self-destruction, or any attempt thereat, whether the Insured be sane or insane; disease or illness of any kind; physical or mental infirmity; poisoning or infection, other than infection occurring simultaneously with and in consequence of external and bodily injury; inhaling of gas, whether voluntary or otherwise; any violation of law by the Insured; war or any act of war, insurrection or riot; military or naval service; engaging, as a passenger or otherwise, in any kind of marine, submarine or aeronautical operation.

Failure to pay any premium on said policy or this supplemental agreement, when due and payable, shall automatically terminate this supplemental agreement and all rights hereunder. The provisions contained in said policy and the application therefor, concerning statements and representations by the Insured, modification of contract, payment of premiums, grace for payment of premiums, proofs of death, change of beneficiary, assignment, and automatic premium loan, if any, are hereby referred to and by such reference made a part of this supplemental agreement. No other provisions of said policy shall be held or deemed to apply or be a part of this supplemental agreement, except that the provision of said policy as to reinstatement shall apply hereto except that this supplemental agreement shall not be reinstated unless said policy is in force and no premium is in default thereon, or unless said policy is reinstated at the time of reinstatement of this supplemental agreement.

Upon written request of the Insured on any premium due date and the return of the policy and this supplemental agreement for proper endorsement, the Company will cancel this supplemental agreement. This supplemental agreement shall automatically terminate at the end of the premium paying period of said policy or on the anniversary of the policy on which the age of the insured, at nearest birthday, is sixty years, whichever date is the earliest, or if said policy be surrendered or converted under one of its non-forfeiture provisions, either automatically or otherwise, or otherwise terminated. Whenever this supplemental agreement shall be cancelled or otherwise terminated, whether upon request of the Insured or in accordance with its terms, the premiums thereafter due under said policy shall be reduced by the amount charged therein for this supplemental agreement. If for any reason such reduction shall not be made and said amount shall be paid to and received by the Company as a part of such premium, the amount overpaid will be refunded by the Company and the Company shall not incur any other or further liability on account of such payment.

The Annual Premium under said policy includes an Annual Premium of $ 22.50 for this supplemental agreement; each installment of premium under said policy includes such proportion of the Annual Premium for this supplemental agreement as such installment of premium bears to the Annual Premium under said policy.

This supplemental agreement is issued in consideration of the statements and representations made in the application herefor, whether included in the original application for the above policy or in a separate application, a copy of which application is attached to said policy and made a part hereof, and the payment of the premiums herefor, which are included in and payable concurrently with the premiums on said policy, during the continuance of this supplemental agreement.

In Witness Whereof, the Bankers Union Life Insurance Company has caused this Supplemental Agreement to be executed at its Home Office in Denver, Colorado, this 27TH day of OCTOBER, 1954.

T. O. McCormick
Secretary

C. B. McCormick
President

Checked by

Form R-44-TM

DUPLICATE

APPLICATION FOR LIFE INSURANCE AND DECLARATION AS TO INSURABILITY

To Bankers Union Life Insurance Company

DENVER, COLORADO

DEFENDANT'S EXH No 5 (CONT.)

1. Full name ANNA GRACE MONTGOMERY Height, Weight, Build, Complexion and Glasses? M Born in OR

2. Residence No. 4100 S.W. 49th Ave. Street and Number Where Rented or Owned Own or Rent ACKERTON City or Town OREGON State

3. A. Married or single? M Previous residence SAGINAW MICHIGAN

B. Business Address R.R.W. WITH, SAGINAW DRUG INC. Name of employer BUSINESS Business or Occupation

4. Present occupation HOUSE WIFE Nature of Work

5. A. Name of firm

B. Nature of business

C. Do you intend to be employed? NO If so, give details

6. Age nearest birthday 34 YRS. Date of birth 18TH DEC. 1919 Place of birth ST. JAMES, MICH.

Language (Has he special reasons with to Have Term Insurance with Some Policy of other, because of war or some action, etc.)

7. I, A.G.M. request the Special Automatic Premium Loan Privilege. (Insert "not" if this privilege is not desired)

8. Beneficiary | Other name to fill | Relationship | Beneficiary's Address if Different from Applicant's

JOHN LYLE MONTGOMERY HUSBAND SAME

9. Do you reserve the right to change Beneficiary? Yes No

10. Amount of Insurance, $ 5,000 11. Kind of Policy ORDINARY LIFE 12. Annual Premium $ 6.90

13. Name of Company | Amount | Date

None

14. A. Have you ever had any other life insurance applied for, issued or declined? NO

B. Have you any other life insurance in force now? NO

C. Will this insurance replace any other life insurance? NO

D. Have you ever had any insurance reinstated? NO

E. Have you any other application for life insurance pending? NO

15. A. Are you now actively at work? NO

B. Have you been actively at work for the past 30 days? NO

16. Have you ever been refused life insurance or had your insurance discontinued? NO

17. Have you had or have you ever been told you had or have you ever been treated for:

(a) Epilepsy, fainting spells, or convulsions? NO (b) Dizziness, pain in the head, or headaches? NO (c) Heart trouble, high or low blood pressure? NO

(d) Asthma, bronchitis, or chronic cough? NO (e) Kidney, bladder, or urinary disease? NO (f) Stomach, liver, or intestinal disease? NO

(g) Ulcer or tumor, cancer, or growth? NO (h) Sugar in urine, or diabetes? NO (i) Rheumatism, gout, or arthritis? NO

18. Name below all causes for which you have consulted a physician or healer in the last ten years; give details:

Name and Address of Physician or Healer	Date	Duration	Complication	No. Consulted	Results	Name and Address of Hospital
DR. RUSSELL [illegible]	5 YEARS	[illegible]	NONE		RECOVERED	SAGINAW GENERAL
[illegible]	3 YEARS	[illegible]	NONE		RECOVERED	DR. IRA KEMPF

19. Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment or disease not mentioned above? (If yes, give full details) NO

20. A. Are you subject to military duties? NO

B. Have you been rejected for military service? NO

21. Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment or disease not mentioned above? (If yes, give full details) NO

22. Have you ever had or been advised to have a surgical operation or have you ever consulted any physician for any ailment or disease not mentioned above? (If yes, give full details) NONE

Name Other Corrections or Address

Name and Address of Three Intimate Friends

23. Beneficiary: To John Lyle Montgomery, Husband, First beneficiary. Contingent Beneficiaries: Richard Lee and Ronald Jean Montgomery, Sons. (Share and share alike or to the survivor thereof.) If under age 35.

24. Insurance applied for is to be issued on the plan of

Witness

Applicant

Date

Agent

Agent's Number

No 59797

This number is shown on Bankers medical folders. Do not allow Examiner to fill out or complete the Application.

IF APPLICANT IS A FEMALE, ANSWER QUESTIONS ON BACK OF APPLICATION

PLAINTIFF'S EXHIBIT No. 2-A 2724

Declaration made to the Medical Examiner in continuation of and forming part 2 of my application to the

Write in BLACK ink. **Bankers Union Life Insurance Company, Denver, Colorado** Corrections must be initialled. Do not make erasures.

1. A. What is your full name? PRINT THE NAME PLAINLY.	A. ANNAGRACE MONTGOMERY
B. What is your exact date of birth.	B. 1901 Day DEC Month 1919 Year
C. What is your occupation? (Give full details.)	C. HOUSE WIFE
D. How long have you been engaged in your present occupation?	D.
E. What was your previous occupation?	E. NONE
F. Do you contemplate making any change, temporary or permanent, in your occupation? (If so, give full details.)	F. NO
2. A. Do you contemplate changing your residence or traveling outside of the mainland of the United States?	A. NO
B. Have you ever changed your residence on account of your health?	B. NO
C. Have you ever lived in the same house or room with a tuberculous person? (If so, give full details.)	C. NO
D. Are you single, married, widowed, or divorced?	D. MARRIED
3. Give aviation activities, past, present or contemplated.	NONE
4. A. State definitely kind and amount of alcoholic beverages used by you and how frequently.	A. OCCASIONALLY
B. If not used, how long have you been a total abstainer?	B.
C. Have you at any time used them to excess? (If so, when?)	C. NO
5. Have you ever used opium, cocaine or other drugs, or have you ever taken treatment for the liquor or the narcotic habit? (If so, when?)	NO
6. Have you consulted or been treated by a physician during the past two years? State particulars, date and Doctor's name and address.	NO
7. Has any Life Insurance Company ever examined you without issuing a policy exactly as applied for? (If so, state name of Company and give particulars.)	NO
8. Are you receiving, or have you ever applied for, a pension, Government Compensation, or Disability Insurance? (Give full particulars.)	NO

BANKERS UNION
RECEIVED
OCT 18 1954

THESE QUESTIONS MUST BE ANSWERED FULLY AND WITH SPECIAL CARE

	"Yes" or "No"	Name of Ailment Disease or Injury	No. of Attacks	Date	Duration	RESULTS and, if within five years, name and address of every physician consulted
9. Have you ever suffered from any ailment or disease of						
A. Brain, Nervous System?	NO					
B. Heart, Lungs?	NO					
C. Stomach, Intestines, Liver, Kidneys, Bladder?	NO					
D. Skin, Middle Ear, Eye, Nose, Throat?	NO					
10. A. Have you ever had Rheumatism, Gout, Syphilis or Goitre?	NO					
B. Have you ever raised or spat blood?	NO					
C. Have you ever had any accident or injury?	NO					
D. Have you ever undergone any surgical operation?	YES	SUSPENSION UTARUS		3 YRS AGO (ZEA)		EXCELLENT DR. IRA NEHER
E. Have you consulted or been treated by any physician for any ailment or disease not included in your above answers? (If so, give full details.)	YES NO	NERVOUSNESS	BEFORE & SINCE	AFTER ABOVE		EXCELLENT DR. JOE COONEY

11. Family Record if LIVING	Age	State of Health If not good, give full reasons	IF DEAD	Age	Cause of Death	How Long Ill
Father			Father YES	74	STROKE	2 WKS.
Mother	74	FAIR	Mother			
How many brothers? (If none living, so state.) 5	58		How many brothers? (If none dead, so state.) 1	46	MALARIA-HEART	
	54					
	50					
How many sisters? (If none living, so state.) 5	57		How many sisters? (If none dead, so state.)			
	52					
	46					

I HEREBY DECLARE that all the statements and answers to the above questions, together with those I have made in Part 1, are complete and true, and I agree that they shall form a part of the contract of insurance applied for. I hereby authorize any physician or other person, who has or may attend me, to give to said Insurance Company any information they acquire.

Dated this 14 day of October, 1954

Witness Ruth Esther

Annagrace Montgomery
(The name to be signed in full) Applicant's Signature.

PART III. MEDICAL EXAMINER'S REPORT TO BE FILLED OUT IN PRIVATE

Make a Very Careful Examination of Heart and Lungs With Stethoscope, Applicant Bare Skin.
Please Make No Comments to the Applicant or Agent Regarding Your Examination or the Probable Action of the Company

NOTE: Examiner must also complete Part II on reverse side.

1. (a) Actual Weight In Ordinary Clothing	127	(c) Actual Height	5ft	2. Measurement of Chest Expd	Forced Inspiration 35	Forced Expiration 32½	Girth of Abdomen 29	3. Temperature 98
(b) Did you Weigh Applicant?	yes	(d) Did You Measure Applicant?	yes		35½			

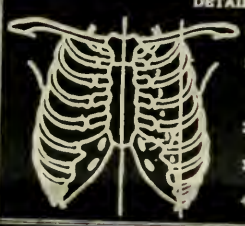
4. (a) EXAMINATION OF THE HEART	BEFORE EXERCISE (Applicant in Sitting Position)	IMMEDIATELY AFTER EXERCISE (30 Deep Knee Bends in 45 Seconds)	THREE MINUTES AFTER EXERCISE
Pulse Rate:	68 Beats per Minute	76 Beats per Minute	64 Beats per Minute
Intermissions Or Irregularities:	No Beats per Minute	Beats per Minute	
Blood Pressure: Diastolic at { 4th Phase / 5th Phase }	110 Systolic / 78 Diastolic		105 Systolic / 78 Diastolic
Any Murmur?			

(b) If Murmur Found Give Timing, Area And Direction Of Transmission. (See Diagram)	
(c) Is There Any Evidence Of Hypertrophy? If so, state whether slight, moderate or marked. (See Diagram)	No
(d) Is There Any Evidence Of Undue Weakness, Cyanosis, Dyspnoea Or Oedema? If so, state which.	No
(e) Is There Any Evidence Of Arteriosclerosis? If so, describe.	No

5. DO YOU FIND ANY EVIDENCE OF PAST OR PRESENT DISEASE:

(a) Of The Lungs? If so, describe and give location.	No
(b) Of The Stomach Or Any Of the Abdominal Organs? A history of appendicitis, hepatic colic, ulcer of the stomach, should lead to careful palpation of the abdomen to determine the presence of tenderness, masses, rigidity or adhesions.	Yes appendectomy 1944
(c) Of The Skin, Ear, Middle Ear, Or Eyes?	No
(d) Of The Teeth, Tonsils Or Throat?	No
(e) Of The Nervous System? (1) Are the knee-jerks absent? (2) Are pupils unequal in size or the reflexes to light absent or sluggish? (3) If reflexes are not normal is there any suspicion of syphilis, locomotor ataxia or organic nervous disease?	(1) yes (2) yes (3) No
6. Is There A Goitre Or Any Enlargement Of The Thyroid Or Lymph Glands? If Goitre, is it symmetrical, asymmetrical, nodular or diffuse.	No
7. Is There Any Evidence Of Varicose Veins or Ulcers?	(a) No
(b) If "Yes" Give Degree As Mild, Moderate Or Severe.	(b)
(c) Do They Extend Above The Knees?	(c)
8. Is The Applicant Lame, Maimed Or Deformed? If so, describe fully.	No
9. Does The Applicant's Appearance Indicate Good Health?	Yes
10. (a) How Long Have You Known Applicant And How Well?	(a) 4 yrs
(b) If Not Known, How Was Applicant Identified.	(b)
11. (a) What Are The Past and Present Habits Of The Applicant, With Respect To The Use Of Alcohol And Narcotics?	(a) Temp. habits Moderate
(b) What Is Applicant's General Standing In Community?	(b) Very good

DETAILS



Use Diagram For Abnormal Heart Findings

1. Indicate the Apex by ×. The Apex Beat is 4th inches to the left of midsternal line in the 5th interspace.
2. Indicate area over which murmur is heard by □.
3. Indicate point of greatest intensity by O.
4. Indicate direction of transmission by →

URINALYSIS

Urine Was Urine Voided? A.M. P.M.

Specific Gravity: Reaction:

Albumin? Test Used:

Sugar? Test Used:

Have You Mailed Urine Specimen to the Home Office?

Mail Urine Specimen to Home Office:
If over age 50.
If the amount of insurance applied for is over $15,000.
If you find presence or history of cardiovascular or urinary abnormality.

Amount of Insurance Applied for	Name of Agent requesting this Examination:
$ 15,000	Mr. E. Drake

ADDITIONAL REMARKS: State any additional facts which may influence the character of the Risk.

(a) Would You Recommend Acceptance Of This Risk? Yes

(b) Any Exceptions Or Qualifications?

FOR WOMEN

A. Number of children borne?	A. Two	D. Has she ever had a miscarriage? If so, give date and full particulars.	D.
B. Age of youngest?	B. 5 yrs	E. Has she passed the climacteric?	E. No
C. Is she pregnant? If so, how far advanced?	C. No	F. Has she ever had any disease peculiar to her sex?	F. No

I certify that I have carefully examined Mrs. Grace Montgomery whose signature is affixed to the foregoing declarations, and that the examination was made in private at { My office / Applicant's residence / Applicant's place of business } this 17 day of October 1944

Examined at Middletown (Town) Middlesex (County) Conn. (State)

Robt. E. Shea M.D. (Medical Examiner)

City Hall Bldg. Middletown Conn. (P. O. Address of Medical Examiner)

N. B.—THIS EXAMINATION MUST BEAR DATE OF DAY WHEN ACTUALLY MADE, AND UNDER NO CIRCUMSTANCES ANY OTHER.

If not a regular appointed Examiner of the Company, state where graduated Yale Medical Sch. Date of graduation June 1922

Names of companies for which you examine? None

Form 8026 5000 8-43 WOG

[Endorsed]: No. 15918. United States Court of Appeals for the Ninth Circuit. Bankers Union Life Insurance Company, a corporation, Appellant, vs. John Lyle Montgomery, Appellee. Transcript of Record. Appeal from the United States District Court for the District of Oregon.

Filed: March 5, 1958.

Docketed: March 8, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For The Ninth Circuit

No. 15918

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, Appellant,

vs.

JOHN LYLE MONTGOMERY,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY

Appellant adopts as its Statement of Points on Which it Intends to Rely its Points on Which Appellant Intends to Rely filed in the District Court

and transmitted to this Court as a part of the record on appeal herein.

KOERNER, YOUNG, McCOLLOCH,
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 8, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPLICATION TO BE RELIEVED FROM PRINTING AND REPRODUCING CERTAIN EXHIBITS

Appellant respectfully requests this Court to relieve it from the obligation of printing or reproducing any of the exhibits introduced in evidence during the trial of the above entitled matter with the exception of exhibits numbered 1, 2a and 3a and further requests that this Court consent to consider all other exhibits offered and received in evidence and all exhibits offered but not received in evidence in their original form as transmitted to this Court by the District Court.

Appellant further requests that this Court permit the above described exhibits 1, 2a and 3a to be printed by photostatic process and further that the Court consent to consider said exhibits 1, 2a and 3a in photostatic form.

This request is based upon the fact that the remaining exhibit offered and received in evidence and exhibits offered but not received in evidence are bulky and not readily printable because they consist of hospital records, X-ray photographs and other papers which would be difficult and expensive to reproduce. In the opinion of appellant, the determination of the appeal herein will depend primarily upon the testimony and exhibits 1, 2a and 3a.

KOERNER, YOUNG, McCOLLOCH,
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Appellant.

[Title of Court of Appeals and Cause.]

AFFIDAVIT

State of Oregon,
County of Multnomah—ss.

I, James H. Clarke, being first duly sworn, depose and say:

I am one of the attorneys for the appellant above named;

That the exhibits offered and received in evidence during the trial of this case (other than those numbered 1, 2a and 3a, and exhibits offered but not received in evidence during the trial of this case are bulky and not readily printable, because they consist of hospital records, X-ray photographs and

other papers which would be difficult and expensive to reproduce; in my opinion the determination of the appeal herein will depend primarily upon the testimony and exhibits 1, 2a and 3a.

/s/ JAMES H. CLARKE.

Subscribed and sworn to before me this 6th day of March, 1958.

[Seal] /s/ V. M. KEPPEL,
Notary Public for Oregon. My Commission Expires Aug. 31, 1959.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 8, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ALL THE RECORD MATERIAL TO CONSIDERATION OF THE APPEAL

Appellant designates as all the record material to consideration of the appeal and to be printed herein:

All portions of the record contained in appellant's Designation of Portions of the Record to be Contained in the Record on Appeal and in appellant's Supplemental Designation of Portions of the Record to be Contained in the Record on Appeal filed in the District Court, with the following modifications:

1. Items 8 and 19 of appellant's said Designation, which apparently do not exist as separate items in the files and records of the District Court and for want thereof have not been separately identified and transmitted to this Court by the Clerk of the District Court, need not be printed.

2. With respect to Item 13 of appellant's said Designation, appellant requests that Exhibits 1, 2a and 3a, being the subject policy of insurance and the two parts of the application therefor, be printed, and, to save expense, that this be done by photostatic copy. The remaining exhibits offered and received in evidence need not be printed.

3. With respect to Item 12, appellant designates all of the same to be printed, this being specifically defined to include:

a) the transcript of testimony;

b) proceedings upon the return of the jury's verdict;

c) proceedings upon the argument of appellant's motion for judgment n.o.v.

4. Item 14 need not be printed.

5. In addition, appellant specifically designates for printing:

a) The Statement of Points on Which Appellant Intends to Rely, filed herewith in this Court;

b) This designation.

KOERNER, YOUNG, McCOLLOCH,
& DEZENDORF,
/s/ JOHN GORDON GEARIN,
/s/ JAMES H. CLARKE,
Attorneys for Appellant.

Acknowledgment of Service Attached.

[Endorsed]: Filed March 8, 1958. Paul P. O'Brien, Clerk.

No. 15918

United States
COURT OF APPEALS
for the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY, a corporation,

Appellant,

vs.

JOHN LYLE MONTGOMERY,

Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

KOERNER, YOUNG, McCOLLOCH & DEZENDORF,
JOHN GORDON GEARIN,
JAMES H. CLARKE,
Eighth Floor, Pacific Bldg., Portland 4, Oregon,
Attorneys for Appellant.

BENSON & DAVIS,
W. F. WHITELY,
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Public Service Building, Portland 4, Oregon,
Attorneys for Appellee.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 6-58

SUBJECT INDEX

TABLE OF CASES

TABLE OF STATUTES

No. 15918

United States
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for the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY, a corporation,

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vs.

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Appellee.

APPELLEE'S BRIEF

Appeal from the United States District Court for the District of Oregon.

HONORABLE GUS J. SOLOMON, District Judge.

STATEMENT OF PLEADINGS and FACTS DISCLOSING JURISDICTION

Plaintiff-Appellee, a citizen of the State of Oregon, brought this civil action in the Circuit Court for Multnomah County, Oregon, to enforce the provisions of a life insurance policy issued by Defendant-Appellant on the life of Appellee's wife (R. 4-8). The amount in

controversy, exclusive of interest and costs, exceeds $3,000 (R. 3, 4-8, 10-14). Pursuant to 62 Stat. 937 (28 USCA Sec. 1441) Appellant removed the case to the United States District Court for the District of Oregon which had jurisdiction under 62 Stat. 930 (28 USCA Sec. 1332) and 62 Stat. 937 (28 USCA 1441).

The appeal is from the final judgment of the District Court (R. 21-22) and this Court has jurisdiction by virtue of 62 Stat. 929, 65 Stat. 726 (28 USCA Sec. 1291) and 62 Stat. 930 (28 USCA Sec. 1294).

STATEMENT OF THE CASE

Appellee does not controvert Appellant's Statement of the Case.

AS TO APPELLANT'S STATEMENT OF THE EVIDENCE

It is felt that an erroneous impression created by Appellant's Statement of the Evidence should be corrected. Appellant would have the Court believe Mrs. Montgomery was taken to Holladay Park Hospital in a condition of serious mental difficulty and placed in a specially locked room (Appellant's Brief 6). This was not the case and the impression Appellant seeks to produce by these statements is far from the facts shown by the record (R. 60, 67, 73-75, 82-83, 155).

AS TO APPELLANT'S SPECIFICATION OF ERROR NO 1

Summary of Argument

In determining whether the trial court erred in denying the motion for a new trial, the motion must be regarded as having admitted the truth of Appellee's (plaintiff's) evidence, and of every reasonable inference of fact that may be drawn in Appellee's favor from the evidence. It is the sole province of the jury to settle disputes as to the material facts and the reviewing court cannot weigh or evaluate the evidence. The motion for a directed verdict cannot be granted if there is any substantial evidence in the record to support the verdict. *Cays vs. McDaniel, et al,* 204 Or. 449, 452, 283 P.2d 658. *Phillips vs. Colfax Company, Inc.*, 195 Or. 285, 292, 302-303, 243 P.2d 276, 245 P.2d 898.

Appellant apparently misconceives the issue presented by its first Specification of Error. Although its Statement of the Evidence (Appellant's Brief 3-12) sets forth evidence supporting its contention in the trial court, the issue is not whether there is evidence contrary to the jury's verdict. The issue raised by the first Specification of Error is, rather, whether there is any substantial evidence in the record supporting the jury's verdict that none of the answers covered by the verdict was wilfully false. The Supreme Court of Oregon in *Phillips vs. Colfax Company, Inc.*, 195 Or. 285, 243 P.2d 276, 245 P.2d 898, summarized the function of the reviewing Court in this situation as follows:

"We have frequently and consistently defined the powers and limitations of this court when called upon to review alleged errors predicated upon a trial court's refusal, as here, to grant motions of nonsuit or motions for a directed verdict in law actions. In *Fish vs. Southern Pacific Co.,* 173 Or. 294, 301, 143 P2d 917, 145 P2d 991, we said:

" ' . . . In considering the propriety of these rulings, the motions must be regarded as having admitted the truth of plaintiff's evidence, and of every inference of fact that may be drawn from the evidence. The evidence itself must be interpreted in the light most favorable to plaintiff. *McCall vs. Inter Harbor Nav. Co.,* 154 Or. 252, 59 P2d 697. Where the evidence conflicts, the court may not infringe upon the function of the jury by seeking to weigh or evaluate it, but is concerned only with the question of whether or not there was substantial evidence to carry the case to the jury and to support the verdict. *Ellenberger vs. Fremont Land Co.,* 165 Or. 375, 107 P2d 837; *Allister vs. Knaupp,* 168 Or. 630, 126 P2d 317.'

"Also see *Smith vs. Industrial Hospital Ass'n.,* 194 Or. 525, 242 P2d 592, 596; *Edvalson vs. Swick,* 190 Or. 473, 478,227 P2d 183; *Dudleston vs. Chiravollatti,* 184 Or. 405, 415, 198 P2d 858. Such inferences favorable to plaintiff may also be drawn from defendant's as well as plaintiff's evidence. *Smith vs. Industrial Hospital Ass'n.,* supra."

In accordance with these principles, the verdict and evidence should be examined.

Argument

By the Special Interrogatories the jury was asked to consider the answers given by Dr. and Mrs. Montgomery to questions 27(e), 28, 29 and 33 on Appellant's

application for the policy of insurance it issued on Mrs. Montgomery's life (R. 15-18, Ex. 1, R. 227). Each of these questions, as it appeared on the application, together with the answer given by the Montgomerys, was set forth in the interrogatories (R. 15-18). The jury was then asked, as to each question and answer thus set out: "Was such answer wilfully false?"; "Was such answer material?"; and "Did the defendant (Appellant) rely on it?" (R. 15-18). As to question 29, the jury was also asked, "Was such answer false?" (R. 17). In each case, that is, as to each of the questions put by Appellant in the application, and as to each of the answers of the Montgomerys thereto, the jury found that the answer was not wilfully false, and that the answer was material and relied upon by Appellant (R. 15-18). Also, in the case of question 29, the jury found that the answer was not false (R. 17).

Question 27(e) asked whether Mrs. Montgomery had, had been told she had, or had been treated for: epilepsy, mental derangement, nervous prostration, syphilis, paralysis, convulsions, or fainting spells (R. 227). Answering this, Dr. or Mrs. Montgomery wrote in "NO", and underlined "nervous prostration (R. 159-161, 227). This was done to note an exception (R. 161). That is, they knew that Mrs. Montgomery had not had, had not been told she had, nor had been treated for any of the conditions noted in 27(e), with the exception of nervousness (R. 161). Mrs. Montgomery had been treated in the spring of 1951 by Dr. Coen, a psychiatrist, for a condition of which Dr. Coen spoke to her husband in terms of nervousness, nervous exhaus-

tion, prostration (R. 157). At that time, Dr. Montgomery was told by Dr. Coen that it would be very good for Mrs. Montgomery to get outside and to garden and to relax (R. 157). Dr. Dickel, a psychiatrist associated with Dr. Coen, testifying as a psychiatrist, and assuming that he had been told that his condition was schizophrenia, paranoid type, which was the diagnosis of Mrs. Montgomery's condition in the spring of 1951, would have indicated "nervous prostration" in answering 27(e) (R. 57-58). Based on the hospital records on Mrs. Montgomery, Dr. Lee, Appellant's medical director, who examined and approved her application on behalf of Appellant, stated that she would not come under the classification of "nervous prostration" (R. 109-110, 112-113). This underlining of the term, however, put Dr. Lee on notice that Mrs. Montgomery might be suffering from some mental or nervous disorder within the meaning of the term, although he said he "didn't put too much on that" because of the answer to question 28 (R. 114-115).

Question 28 asked the applicant to name all causes for which she had been treated in the last ten years, giving details and including particulars of any "yes" answers to question 27(e) (R. 227). In answer to question 28, two causes for which Mrs. Montgomery had been treated were noted, i.e., nervousness and a suspension of the uterus (R. 227). In each case, in addition to other details of these two causes for which she had been treated, in accordance with the exact language of the question, the name of the *attending* physician was noted (R. 227). In the case of the nerv-

ousness this was Dr. Cooney who, in the spring of 1951 referred her to Dr. Coen for consultation, advise and/or treatment (R. 41, 44). Appellant's medical director, Dr. Lee, agreed that Dr. Cooney would still be the attending physician under these circumstances, and also stated that in his examination of the application (he personally examined and approved Mrs. Montgomery's application for the Appellant (R. 100)) it would have made no difference whether Dr. Cooney or Dr. Coen was noted as the attending physician (R. 118). Dr. McGee, Appellant's medical examiner, also noted Dr. Cooney as the attending physician for Mrs. Montgomery's nervous condition (R. 144-146). This was so in spite of the fact that Dr. McGee, who had examined other life insurance applicants for Appellant, completing their applications, and who was therefore familiar with the questions and the information sought thereby, knew at the time of the examination that Mrs. Montgomery had been treated by doctors other than Dr. Cooney for the nervous condition (R. 144-146).

Question 29 asked if the applicant had ever consulted any physician for any ailment not included in the previous answers in the application (R. 227). This basically is the same as question 10 E in part 2 of the application (the declaration to the medical examiner) (R. 230). Question 33 asked for any additional facts or special circumstances known to the applicant which might affect the risk of insurance on the applicant's life, and of which the insurer should be advised (R. 227). In accordance with the request following this question, that if there were no such facts or circumstances the appli-

cant should state "None", Dr. and Mrs. Montgomery stated "None" (R. 159, 227).

The verdict of the jury was, specifically, that none of these answers was wilfully false, and further, that the answer to question 33 was not false (R. 15-18).

Mrs. Montgomery's condition in the spring of 1951 was related by her husband to a menopausal situation despite her relatively youthful age of 31 years, since, oddly enough, the later women begin their menses, the earlier they go through the change of life (R. 153). Mrs. Montgomery had not begun her menses until she was 17 and had two sisters who had gone through very early menopausal changes—in their late twenties or early thirties (R. 153). While Dr. Cooney was treating Mrs. Montgomery she periodically experienced difficult menstruations and would become depressed as her menses approached (R. 68-69). After her treatment at Holladay Park Hospital in April of 1951, and up until her accidental death in January, 1956, Mrs. Montgomery's health was good, although she continued to have some trouble during menstruation (R. 156-157). At the time of making the application Mrs. Montgomery's health and physical condition were good (R. 162). She had the ability to do all of her housework, manage a household including two children, shop, and to go out socially and on vacations with her husband (R. 162).

The reaction described by Dr. Coen's diagnosis of Mrs. Montgomery's condition in the spring of 1951 is frequently manifested by women in the menopausal or premenopausal years, some temporarily, some a little

longer, and some occasionally chronic (R. 54). Any number of symptoms result from this condition, symptoms which are *very common* for women experiencing or about to go into the menopause (R. 113). Appellant's medical director, Dr. Lee, applied to the symptoms exhibited by Mrs. Montgomery the term "psychosis," which, when associated with the menopause, is insurable and is considered a fair risk (R. 114). As Appellant's medical examiner (in addition to his own private practice, he examines approximately 2000 applicants for Appellant's policies each year (R. 109)), Dr. Lee does not pay much attention to nervousness referred to in an application if it is connected with menopause or surgery (R. 120). From the information he had on Mrs. Montgomery's application, including part 2 thereof, the declaration to Dr. McGee as Appellant's medical examiner, Dr. Lee was satisfied that the application was all right and that no further investigation was necessary (R. 118-119). Dr. Cooney, who was noted on the application as the attending physician for the nervous condition, was not contacted by Appellant with reference to the application (R. 78, 114-115, 119).

As the medical examiner for Appellant for this policy, Dr. McGee found Mrs. Montgomery, at the time of his examination of her, to be in good health (R. 110, 131) and he recommended acceptance of the risk (R. 231). Using Appellant's policy application, which was brought to his office by Mrs. Montgomery, Dr. McGee, on October 14, 1954, gave her a complete physical examination, showing on the application what he did and found (R. 130). He found Mrs. Montgomery to be in

good health, with no indications of mental disease or illness, or of nervous tension (R. 131, 144-145). There was no question in Dr. McGee's mind when he examined and talked with her that there was anything wrong with her (R. 148). The tests made by Dr. McGee were those indicated on Appellant's application (R. 131, 144-145). Dr. McGee had no particular instructions, no form of instructions, no rules or procedures, from the company relating to the physical examination of applicants for life insurance (R. 146).

Yet, in the teeth of Dr. McGee's testimony, Dr. Lee, who at no time saw or examined Mrs. Montgomery, answering a hypothetical question by deposition in Denver, Colorado, stated that she was not in good health in October, 1954, the month of Dr. McGee's examination (R. 107)! Furthermore, in direct contradiction of Dr. Coen's diagnosis of Mrs. Montgomery's condition (R. 90-91), and based solely on the hospital records, Dr. Lee said Mrs. Montgomery's condition in the spring of 1951 was "severe" (R. 117)! Dr. Lee has had no specialized training either in the field of psychiatry or in the study of nervous and mental diseases or ailments (R. 109).

Finally, Dr. Montgomery testified that in the overall discussions had with everyone involved in filling out the application, he and Mrs. Montgomery did their best to put down what they honestly believed her condition had been and was (R. 169). There was nothing they were attempting to conceal from Appellant in the application (R. 162).

Appellant's authorities do not support the contention made by its Specification No. 1, i.e., that the record here fails to show any substantial evidence supporting the jury's findings. In *Mutual Life Insurance Company vs. Chandler,* 120 Or. 694, 252 P. 559, the Court said at 120 Or. 701 (252 P. 561):

> " . . . In this case there is no dispute and the Court also found that the assured did, indeed, consult other physicians and was treated by them, and that information was withheld from the company. . . ."

Despite this finding the trial court denied the insurance company's prayer for cancellation of the policy, and, on appeal, was reversed. The testimony there was uncontroverted that the insured, almost contemporaneously with or at least a short time before making the application, had consulted a physician other than the one named in the application and had taken treatment from him for tuberculosis. In the application, the insured showed only that his tonsils had been removed and gave the name of the doctor performing the operation.

In the instant case the jury's finding was contrary to that of the court in the *Chandler* case.This verdict is supported by substantial evidence. The finding by the trial court in the *Chandler* case in favor of the insurer distinctly distinguishes it from this case.

In *Gamble vs. Metropolitan Life Insurance Co.*, 92 S.C. 451, 75 S.E. 788, the reviewing court held merely that the question of misrepresentation should have been submitted to the jury, since, although there was evidence of misrepresentation in the application, the trial

court nevertheless directed a verdict for the insured. In the present case, the existence of evidence in Appellant's favor is not determinative of its first Specification of Error. That there is substantial evidence in support of the verdict, however, is determinative of this point in Appellee's favor.

Plaintiff in *Comer vs. World Insurance Co.*, 65 Or. Adv. Sh. 745, 318 P.2d 916, conceded the falsity of the answers to the questions in the application but by the doctrine of equitable estoppel tried to show that the insurer should not be permitted to use against him the application he signed (65 Or. Adv. Sh. 747-748, 318 P.2d 918-919). The Oregon Supreme Court examined the evidence there solely for the purpose of determining whether it established any basis for the equitable estoppel (65 Adv. Sh. 770, 318 P.2d 928). There is no admission here that there were false representations. That issue here was determined by the jury in Appellee's favor.

The trial court in *Martin vs. Metropolitan Life Insurance Co.* (CA 5, 1951), 192 F.2d 167, directed a verdict in the insurer's favor. Answering a question in the life insurance application as to what physicians he had consulted or had treated him in the last five years, the insured said, "None." Within four years of the signing of the application the insured had been frequently treated by a doctor for chronic bronchitis, had been treated by another doctor for prostatitis and urethral stricture, and had been treated by still another doctor for a tumor of the kidney. The reviewing court said:

> "On this evidence, Billingslea's [the insured's] unequivocal answer to the question as to what physicians he had consulted or been treated by in the last five years, 'None', was palpably untrue. . . ."

The reviewing court rested its affirmance of the directed verdict for the insured on the clear falsity of the answer touching the other doctors, holding that the concealment, although not a wilful fraud, was material to the risk, and justified avoiding the contract as a matter of law. Certainly the facts of the *Martin* case distinguish it from the evidence now before the court.

There was a finding by the District Court in *Parker vs. Title & Trust Company* (CA 9, 1956), 233 F.2d 505 that the plaintiff (who was alleged to have concealed material facts from the title company in applying for a title insurance policy) had knowledge of the defect in the title, alleged to have been concealed from the title company. On appeal this court held the finding was supported by sufficient evidence. In the instant case the jury found there were no wilfully false answers in the application, a finding which is likewise supported by sufficient evidence. Appellant's contention regarding half truths is inapplicable where, as here, both Appellant's medical director and its medical examiner agree that noting only the attending physician was a proper answer to question No. 28. Dr. Lee was satisfied with the application. "Nervous prostration" was explained by the reference to treatment for nervousness by the attending physician and further investigation was neither indicated nor undertaken.

The facts were *undisputed* that the insured obtained

reinstatement of his insurance policy by false and fraudulent representations, knowingly and intentionally made by him in the case of *New York Life Insurance Co. vs. Yamasaki,* 159 Or. 123, 126, 78 P.2d 570. The ruling of the Oregon Supreme Court affirming the decree canceling the policy has no application to the facts here.

Northwestern Mutual Life Insurance Co. vs. Cohn Bros. (CCA 9, 1939), 102 F.2d 74 closely parallels the instant case. The appellee-insured had a verdict and judgment in the District Court in its action as beneficiary on a life insurance policy. Appellant's defense was that the insured had given false answers to questions asked by its medical examiner. In part 2 of that application was a question asking whether, since birth, the insured had suffered any disease of the liver. The insured was shown to have had a disease of the gall bladder. There was testimony that the gall bladder was regarded by the medical profession as a part of the liver. However, there was also testimony that laymen would not so regard it. The trial judge denied a requested instruction for a directed verdict for the insurer on the ground of a wilful false statement warranting avoidance of the policy. He left it to the jury to determine the question whether the word "liver" as used in the question included the gall bladder. This Court, in affirming the jury's verdict said:

> " . . . Since there was an ambiguity in the use of the word 'liver' in a question to be answered by a layman, here was no basis for an instruction for a verdict for the insurance company which had prepared the questionnaire."

It was held there was no error in refusing to instruct the jury to return a verdict for the insurer.

Attention is next directed to 5 of Appellant's argument (Appellant's Brief 25-26). The "limited physical examination" administered by Appellant's medical examiner was just as indicated by Appellant's application form (R. 145). Appellant gives its medical examiners no particular instructions, no form of instructions, no rules and procedures and asks for no information other than that appearing on its application form (R. 146). Dr. McGee's testimony was that Mrs. Montgomery answered all questions which *he put to her,* not that she answered every question herself on part 2 of the application (R. 136). Dr. McGee himself put the name of Dr. Cooney, the attending physician, on part 2 of the application (R. 146).

Furthermore the "limited physical examination" contention is effectively countered by language from *Stipcich vs. Metropolitan Life Insurance Co.,* 277 U.S. 311, 48 S. Ct. 512, 72 L. Ed. 895. This language appears in the *Stipcich* opinion immediately following the first paragraph quoted by Appellant therefrom (Appellant's Brief 27). The Supreme Court says:

> "Concededly, the modern practice of requiring the applicant for life insurance to answer questions prepared by the insurer has relaxed this rule to some extent, since information not asked for is presumably deemed immaterial. (Citing) . . ."

Furthermore, the language which Appellant omitted from the *Stipcich* opinion (preceding and following the second paragraph quoted at page 27 of Appellant's

Brief) makes it apparent the Court was concerned with the particular factual situation in that case. After applying for the insurance and before delivery of the policy, Stipcich had a recurrence of a duodenal ulcer, of which he did not notify the company. The evidence was uncontradicted that after the application was submitted Stipcich consulted two doctors who told him it was necessary to have an operation to remove the ulcer. The United States Supreme Court reversed the ruling of the trial court, which ruling had refused the beneficiary's offer of proof that the insured communicated this information to the company's agent who had solicited the policy.

It is submitted that the jury's findings, that none of the answers covered by the special interrogatories was wilfully false, were and are fully supported by the record in this case, and that therefore the District Court did not err in denying Appellant's motion for a directed verdict.

AS TO APPELLANT'S SPECIFICATION OF ERROR NO. 2

Summary of Argument

Dr. McGee's knowledge at the time of the medical examination that Mrs. Montgomery had been in Holladay Park Hospital was relevant and material to show what information he had when he completed part 2 of the application, and, having that information, how he did complete the application.

Argument

Contrary to the impression Appellant tries to leave, Dr. McGee stated *positively* that he knew, when Mrs. Montgomery was in his office for the examination, that she had been in Holladay Park Hospital (R. 144). This was uncontradicted. Dr. McGee could not remember whether the information was discussed with Mrs. Montgomery at the time of the examination (R. 145). Notwithstanding this information, he "just put down the one attending physician" (R. 146), just as Dr. and Mrs. Montgomery did in part 1 of the application (R. 227). Counsel for Appellee, in discussing Dr. McGee's testimony before it was admitted stated:

> "Mr. Davis: But, you see, based upon the cases, and I didn't mean to be disrespectful about it, but all the application form says, it says attending physician. It does not ask for any hospitalization. It does not ask for anything." (R. 80).

Thus the testimony which Appellant says is immaterial shows to the jury the knowledge which its medical examiner, who had done work for Appellant before—who had filled out applications for Appellant for other people—had at the time of the examination, and having that knowledge, how he completed the application. Added to the doctor's examination of Mrs. Montgomery and the matters he noted in part 2 of the application, this evidence completes the picture, showing the jury all that the medical examiner knew when he made the examination for Appellant and completed its application form.

Nothing in the decision in *Henderson vs. Union*

Pacific Railroad Co., 189 Or. 145, 219 P.2d 170, the only case cited by Appellant on this phase of the case, indicates a contrary result. To be sure, the Oregon Supreme Court there says at 189 Or. 160, 219 P.2d 177:

> " . . . Before a case can be submitted to a jury in this jurisdiction the proof of material issues must have the quality of reasonable certainty, and a finding dependent upon conjecture and speculation will not be permitted to stand. (Citing)."

However, there is no conjecture or speculation in Dr. McGee's testimony that he knew of the Holladay Park Hospital situation. Without the slightest reservation, the testimony was that Dr. McGee knew, at the time of the examination, of the Holladay Park Hospital situation (R. 144).

Appellant's argument on this point does not present any basis for the exclusion of the testimony.

STATEMENT REGARDING ATTORNEY FEES ON APPEAL

Under Oregon law, inasmuch as the District Court allowed attorneys fees to Appellee, should this Court affirm the judgment, Appellee is entitled to such *additional* sum for attorney fees as this Court shall adjudge reasonable on this appeal: ORS 736.325(2); *Horwitz vs. New York Life Insurance Co.* (CCA 9, 1935), 80 F.2d 295; *American Surety Co. of New York vs. Fischer Warehouse Co., et al* (CCA 9, 1937), 88 F.2d 536; *Michigan Millers Mutual Fire Insurance Co. vs. Grange Oil Co.* (CA 9, 1949), 175 F.2d 544.

CONCLUSION

It is respectfully submitted that, interpreted in the light most favorable to Appellee, and drawing every reasonable inference therefrom, there is sufficient evidence, including all of Dr. McGee's testimony, all of which was properly admitted, to support the jury's verdict. This verdict, and the judgment based thereon, must therefore be affirmed and this Court is respectfully requested to make an allowance to Appellee for his attorney's fees on this appeal.

BENSON and DAVIS,
W. F. WHITELY,
ALAN F. DAVIS.

No. 15918

In the

United States Court of Appeals

For the Ninth Circuit

BANKERS UNION LIFE INSURANCE COMPANY, a corporation, *Appellant,*

vs.

JOHN LYLE MONTGOMERY, *Appellee.*

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court
for the District of Oregon

Honorable GUS J. SOLOMON, *District Judge*

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APPELLANT'S REPLY BRIEF

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Honorable GUS J. SOLOMON, *District Judge*

ARGUMENT

Specification of Error No. 1

1. Appellee suggests (Br 2) that appellant has misrepresented the nature and seriousness of Mrs. Montgomery's condition when she was taken to Holladay Park Hospital the first time. The statement in appellant's brief (Br 6) is drawn from the record: it is entirely correct, and there is nothing in the portions of

the record cited by appellee contradicting or qualifying it in any way.[1] Counsel's concern is a revealing comment on his case.

2. Appellee apparently believes (Br 3-4) that state law controls the question whether there is sufficient evidence to raise a question for the jury. This is incorrect.

> ". . . The question of whether the evidence makes an issue for a jury is one to be determined by the federal courts by their own processes of reasoning and conclusion, and not according to any rule or standard which may be fixed for doing it by statutes or decisions of a state."
>
> (*New York Life Ins. Co. v. Sparkman*, 101 F2d 484 at p. 485 (CCA 5 1939))

See also: *Ling v. Edenfield*, 211 F2d 705 at p. 708 (CA 5 1954); *Reid v. Nelson*, 154 F2d 724 (CCA 5 1946); 14 Cyc Fed Proc (3 ed 1952) 211-212 (§ 67.31).

The issue under federal law is whether there is substantial evidence from which reasonable men might find the material, controverted issues in favor of the plaintiff (14 Cyc Fed Proc (3 ed 1952) 213 (§ 67.31)). In the present case, the admitted and uncontradicted facts demonstrate that appellant was entitled to judgment as a matter of law.

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1. Appellee's reference to page 155 of the record refers in fact to a different and later trip to the hospital.

3. *Appellee has wholly failed to refute appellant's charge (Br 18-19, 25-26) that the deceased wilfully failed to disclose her prior medical history as required by the policy application.* Questions 10 (d) and (e) of Part 2 (Declaration to Medical Examiner) requested information respecting ailments and diseases not included in previous answers. They *expressly requested* the "name and address of *every* physician consulted" (emphasis supplied).[2] In answering the question, the deceased specifically mentioned her alleged "nervousness"; yet the only physician disclosed therein is "Dr. Joe Cooney" (R 230). She failed to mention that she had been extensively treated by two psychiatrists, Dr. Dickel or Dr. Coen, who were actually in charge of her case.

The foregoing facts are admitted. They are decisive of the present appeal under the Oregon authorities referred to in appellant's brief. There was no conflict of evidence with respect to them, and appellant was entitled to judgment as a matter of law.

4. The allegation in appellee's brief (Br 5) that Mrs. Montgomery

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2. Question 10 (d) is not, as suggested by appellee (Br 7), "basically . . . the same" as Question 29 of Part 1. In answering Part 1, the deceased's "nervousness" had been mentioned in answer to an earlier question (Question 28) which requested *only the name of the attending physician.* Question 29 was answered "No" (R 227). Appellee's elaborate contention that Dr. Cooney was Mrs. Montgomery's "attending physician" (Br 6-7) is wholly beside the point.

> "had not had, had not been told she had, nor had been treated for any of the conditions noted in 27 (e) with the exception of nervousness"

is not supported by his reference to the record (R 161).

5. Appellee still insists (Br 7), despite his repeated and express waiver of any claim based on waiver or notice, that appellant was on notice of the true facts by reason of Dr. Lee's extraneous knowledge of the deceased's hospitalization. Nothing could illustrate more graphically the prejudice to appellant caused by the improper admission of Dr. McGee's testimony (Second Specification of Error, Br 28-31). It reveals exactly why the evidence was offered, free from pious references to Dr. McGee's alleged "interpretation" of the questions in the policy application.

6. a) Appellee's discussion of the menopausal origin of Mrs. Montgomery's condition (Br 8-9) does not relate to the truth or falsity of her answers, *but only to their materiality*. This question, however, has already been decided adversely to appellee by the very jury on whose verdict he relies. *The jury has expressly found that the answers on the application were material.*

b) Further, the suggestion that her condition was common in women approaching the menopause is

demonstrably incorrect. The deceased was taken to the hospital by ambulance in an irrational condition and during the course of extensive hospitalization was given five shock treatments. How could this or any jury conclude that this was a "common" condition?

c) *Finally, appellee wholly ignores and fails to contradict appellant's contention that these were additional facts relating to her medical history within the scope of Question 33 (Part 1), which the insured was thereby obligated to disclose and which appellee, himself a doctor, must have known were material* (Br 27-28).

As quoted (in part) by appellee himself (Br 11):

". . . In this case there is no dispute and the court also found that the assured did, indeed, consult other physicians and was treated by them and that information was withheld from the company. Under such a state of facts the very great weight of well-considered cases is to the effect that it amounts to legal fraud, vitiating the policy. To hold otherwise would take from any party considering an offer the right to accept or reject the same, and this too at the behest of the other party, although the latter had stifled investigation by the concealment of matters which would naturally challenge the consideration of the other. . . ."

(*Mutual Life Insurance Company v. Chandler*, 120 Or 694 at p. 701, 252 Pac 559 (1927))

The record is conclusive that the deceased and her doctor-husband, appellee, wilfully withheld information which related to her medical history and was material to the risk. They were guilty of legal fraud as a matter of law, and appellant was entitled to judgment.

SPECIFICATION OF ERROR NO. 2

1. While the record shows that Dr. McGee knew Mrs. Montgomery had been in Holladay Park Hospital (Br 17), *there is nothing in the record suggesting that he knew that Dr. Dickel and Dr. Coen had attended her. Consequently, there was no possible basis upon which he could "interpret" the question to require only Dr. Cooney's name. The asserted basis of admissibility was completely lacking.*[3]

2. Furthermore, Dr. McGee could not "interpret" the question when he had only second-hand information and knew nothing of her actual condition (R 135, 138). The court's entire theory of admissibility ultimately depended upon proof that Dr. McGee had first-hand knowledge of the facts which would make the doctor's conclusion (or "interpretation") helpful to the jury.

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3. The question (10 d, e) did not seek the name merely of the "attending physician." It requested the name of *every* physician consulted. Appellee's assertion to the contrary (Br 17) and Dr. McGee's confusion (R 147) demonstrate that appellee's case rests on a misconception of the facts. His contention does not go to the fraud which is charged.

Since there is no claim of waiver or notice, appellant could not be bound or prejudiced by his interpretation of what the applicant or someone else might tell him. The testimony was inadmissible and highly prejudicial.

3. Appellee is incorrect in suggesting (Br 5) that Dr. McGee did not ask and receive answers to all of the questions on the application when he interviewed Mrs. Montgomery. In fact, he testified that she answered every question which he asked and that "*every question was answered.*" (R 136)

CONCLUSION

The evidence is conclusive that the policy was issued as a result of legal fraud of the deceased and her doctor-husband, appellee, and that appellant was entitled to and did rescind it.

It is equally clear that prejudicial error was committed by the trial court in the admission of testimony.

It follows that the judgment of the trial court should be reversed and entry of judgment directed in favor of appellant. If the Court should disagree with appellant in this regard, it should nonetheless allow appellant a new trial.

Respectfully submitted,

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